Docket for 03-343

(42)

No. 03-343 Status: ARGUED
Vide 03-334
Title: Fawzi Khalid Abdullah Fahad Al Odah, et al., Petitioners
v.
United States, et al.
Docketed: September 5, 2003
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (02-5251, 02-5284, 02-5288)
Decision Date: March 11, 2003
Rehearing Denied: June 2, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 2 2003	Petition for writ of certiorari filed. (Response due October 6, 2003)
Sep 2 2003	Appendix of Fawzi Khalid Abdullah Fahad Al Odah, et al. filed.
Oct 3 2003	Brief of respondents United States, et al. in opposition filed. VIDED.
Oct 3 2003	Brief amici curiae of John J. Gibbons, et al. filed. VIDED.
Oct 3 2003	Brief amici curiae of Diego C. Asencio, et al. filed. VIDED.
Oct 3 2003	Brief amicus curiae of Commonwealth Lawyers Association filed. VIDED.
Oct 3 2003	Brief amicus curiae of Former American Prisoners of War filed. VIDED.
Oct 3 2003	Brief amicus curiae of Human Rights Institute of the International Bar Association filed. VIDED.
Oct 3 2003	Brief amicus curiae of Fred Korematsu filed. VIDED.
Oct 3 2003	Brief amicus curiae of Retired Military Officers filed.
Oct 15 2003	DISTRIBUTED for Conference of October 31, 2003.
Nov 3 2003	DISTRIBUTED for Conference of November 7, 2003.
Nov 10 2003	Petition GRANTED limited to the following Question: Whether United States courts lack jurisdication to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba. The cases are consolidated and a total of one hour is allotted for oral argument.
Dec 3 2003	Extension of time within which to file the petitioner's brief on the merits and the joint appendix to and including January 14, 2004.
Jan 12 2004	Brief amici curiae of International Law and Jurisdiction Professors filed. VIDED.
Jan 12 2004	Brief amici curiae of International Commission of Jurists, et al. filed. VIDED.
Jan 12 2004	Brief amicus curiae of Omar Ahmed Khadr filed. VIDED.
Jan 13 2004	Brief amici curiae of International Law Experts Curtis F.J. Doebbler, John Mitchell, and Christine Chinkin filed. VIDED.
Jan 14 2004	Brief amicus curiae of Former American Prisoners of War filed. VIDED.
Jan 14 2004	Brief amicus curiae of Commonwealth Lawyers Association filed. VIDED.
Jan 14 2004	Brief amicus curiae of Abdullah Al-Joaid filed. VIDED.
Jan 14 2004	Brief amici curiae of Nathaniel R. Jones, et al. filed. VIDED.
Jan 14 2004	Brief amicus curiae of Military Attorneys Assigned to Defense in OMC filed.
Jan 14 2004	Brief amicus curiae of Bipartisan Coalition of National and International Non-Governmental Organizations filed. VIDED.

Jan 14 2004	Brief amici curiae of Legal Historians Listed filed. VIDED.
Jan 14 2004	Brief amici curiae of Former U.S. Government Officials filed. VIDED.
Jan 14 2004	Brief amici curiae of Diego C. Asencio, et al. filed. VIDED.
Jan 14 2004	Brief amicus curiae of National Institute of Military Justice filed. VIDED.
Jan 14 2004	Brief amicus curiae of Human Rights Institute of the International Bar Association filed. VIDED.
Jan 14 2004	Brief amici curiae of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland filed. VIDED.
Jan 14 2004	Brief amici curiae of Center for Justice and Accountability, et al. filed. VIDED.
Jan 14 2004	Joint appendix filed. VIDED.
Jan 14 2004	Brief of petitioners Fawzi Khalid Abdullah Fahad Al Odah, et al. filed. VIDED.
Jan 14 2004	Motion for leave to file amici brief filed by Hungarian Jews and Bougainvilleans VIDED.
Jan 14 2004	Brief amicus curiae of Retired Military Officers filed. VIDED.
Jan 14 2004	Brief amicus curiae of Fred Korematsu filed. VIDED.
Feb 3 2004	Extension of time within which to file the respondent's brief on the merits to and including March 3, 2004.
Feb 23 2004	Motion for leave to file amicus brief filed by Hungarian Jews and Bougainvilleans VIDED. GRANTED.
Mar 2 2004	SET FOR ARGUMENT TUESDAY, APRIL 20, 2004.
Mar 3 2004	CIRCULATED.
Mar 3 2004	Brief of respondents United States, et al. filed. VIDED. (Distributed)
Mar 3 2004	Brief amicus curiae of Citizens for Common Defense filed. VIDED. (Distributed)
Mar 3 2004	Brief amici curiae of Former Attorneys General of the United States, et al. filed. VIDED. (Distributed)
Mar 3 2004	Brief amici curiae of American Center for Law & Justice, et al. filed. VIDED. (Distributed)
Mar 3 2004	Brief amici curiae of Law Professors Kenneth Anderson, et al. filed. VIDED. (Distributed)
Mar 3 2004	Brief amici curiae of Washington Legal Foundation, et al. filed. VIDED. (Distributed)
Mar 3 2004	Brief amici curiae of Bill Owens, et al. filed. VIDED. (Distributed)
Mar 3 2004	Brief amici curiae of Alabama, Ohio, Texas, and Virginia filed. VIDED. (Distributed)
Mar 11 2004	Motion of Military Attorneys Assigned to Defense in OMC for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 15 2004	Letter regarding the motion for oral argument from counsel for amicus curiae Military Attorneys Assigned to Defense in OMC received.
Mar 16 2004	Record received from U.S.C.A. Dist. of Columbia Circuit. (1 box)
Mar 22 2004	Motion of Military Attorneys Assigned to Defense in Office of Military Commissions for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Apr 7 2004	Reply of petitioners Fawzi Khalid Abdullah Fahad Al Odah, et al. filed. (Distributed)
Apr 9 2004	Record received from U.S.D.C. District of Columbia Circuit. (3 folders)
Apr 20 2004	Argued. For petitioners: John J. Gibbons, Newark, N.J. For respondents: Theodore B. Olson, Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED
SEP 2 2003

No. 03 343

In The
Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
HEATHER LAMBERG KAFELE

SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-508-8000
Facsimile: 202-508-8100
Attorneys for Petitioners

September 2, 2003

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41 pp

THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in extending this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to create a rigid rule barring any United States court from ever, in any circumstance, considering a claim made by a foreign national held in U.S. custody outside U.S. sovereign territory?

2. Did the Court of Appeals err in holding categorically that the Constitution gives "no constitutional rights, under the due process clause or otherwise," to foreign nationals who are subjected to injurious action by the U.S. Government unless they have set foot physically within territory over which the United States has technical sovereignty (as distinguished from exclusive jurisdiction and control)?

3. Consistently with the Constitution, federal statutes, regulations and treaties, and international law, may U.S. officials imprison citizens of friendly nations indefinitely without charges, without access to their families or counsel, and without even a hearing to determine whether any basis exists for their detentions, after transporting them forcibly thousands of miles to an area under the exclusive jurisdiction and control of the United States?

4. May U.S. government officials evade judicial examination of their actions in detaining people *incommunicado,* and escape the reach of the Constitution and of federal law, simply by electing to confine their prisoners in an area technically outside U.S. sovereign territory although within its exclusive jurisdiction and control?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

The following Kuwaiti nationals who are imprisoned at Guantanamo Bay Naval Base appeared below as plaintiffs: Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Abdulaziz Sayer Owain Al Shammari, Abdullah Saleh Ali Al Ajmi, Mohammed Funaitel Al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdull Mohssin Al Zamil, and Saad Madai Saad Al Azmi. The following additional Kuwaiti nationals, who are family members of the Kuwaiti nationals listed above, also appeared below as plaintiffs: Khaled A.F. Al Odah, father of plaintiff Fawzi Khalid Abdullah Fahad Al Odah; Mohammad R.M.R. Ameen, brother of plaintiff Omar Rajab Amin; Nayef N.N.B.J. Al Mutairi, brother of plaintiff Nasser Nijer Naser Al Mutairi; Meshal A.M.TH Al Mutairi, brother of plaintiff Khalid Abdullah Mishal Al Mutairi; Mansour K.A. Kamel, brother of plaintiff Abdullah Kamal Abdullah Kamal Al Kandari; Sayer O.Z. Al Shammari, father of plaintiff Abdulaziz Sayer Owain Al Shammari; Mesfer Saleh Ali Al Ajmi, brother of Abdullah Saleh Ali Al Ajmi; Mubarak F.S.M. Al Daihani, brother of plaintiff Mohammed Funaitel Al Dihani; Mohammad A.J.M.H. Al Kandari, father of plaintiff Fayiz Mohammed Ahmed Al Kandari; Monzer M.H.A. Al Rabieah, brother of plaintiff Fwad Mahmoud Al Rabiah; Walid Z.A. Al Zamel, brother of plaintiff Adil Zamil Abdull Mohssin Al Zamil; and Hamad Madai Saad, brother of plaintiff Saad Madai Saad Al-Azmi (collectively the "Family Members"). The following appeared below as defendants: the United States of America; George W. Bush,

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW – Continued

President of the United States; Donald H. Rumsfeld, Secretary of Defense; General Richard B. Myers, Chairman of the Joint Chiefs of Staff; Brigadier General Rick Baccus, Commander of Joint Task Force-160, and Colonel Terry Carrico, Commandant of Camp X-Ray/ Camp Delta.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Appendix ("App.") 33-69) is reported at 214 F. Supp. 2d 55 (D.D.C. 2002). The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1-32) is reported at 321 F.3d 1134 (D.C. Cir. 2003).

BASIS FOR JURISDICTION

The judgment of the Court of Appeals for the D.C. Circuit was entered on March 11, 2003. A petition for rehearing was denied on June 2, 2003 (App. 72-74). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

United States Constitution, Amendment V; 5 U.S.C. §§ 555, 702, 706; 28 U.S.C. § 2241(c)(3); U.S. Army Regulation 190-8, Washington, D.C. (1 October 1997); U.S. Department of the Army Field Manual, FM 3-19.40 (1 August 2001); Geneva Convention III, Aug. 1949, art. 5, 75 U.N.T.S. 135; and International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 are reprinted at App. 75-86.

STATEMENT OF THE CASE

(A) Statement of Facts

Petitioners are twelve Kuwaiti nationals (the "Kuwaiti Detainees") imprisoned for over a year and a half at the Guantanamo Bay Naval Base, ("Guantanamo"), and family members who speak on their behalf. The Court of Appeals below affirmed the district court's dismissal of their amended complaint alleging that the refusal of respondents (the "government") (i) to inform them of the charges, if any, against them, (ii) to allow them to meet

with their families and with counsel, and (iii) most importantly, to grant them access to any impartial tribunal, military or civilian, to review the basis for their detentions violates the Constitution, federal law and regulations, and treaties of the United States.

1. The Terrorist Attacks

On September 11, 2001, terrorists high-jacked four airliners flying three of them into the twin towers of the World Trade Center in New York City and the Pentagon, killing thousands of innocent people. In the wake of the attack, which was executed by the terrorist organization known as al Qaida, President Bush launched a military campaign against al Qaida and the Taliban Regime that supported al Qaida.

On November 13, 2001, the President issued a Military Order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in The War Against Terrorism" (the "Military Order"). 66 Fed. Reg. 57, 833-36. (Nov. 16, 2001). Section 1(e) of the Military Order states that, "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained. . . . " Section 2 provides that any non-citizen of the United States may be detained if the President determines "in writing" that "there is reason to believe" he or she "is or was a member of the organization known as al Qaida" or has engaged in or supported terrorism or other acts aimed at injuring the United States.

2. The Kuwaiti Detainees

The complaint asserts that the Kuwaiti Detainees were in Pakistan or Afghanistan as charitable volunteers to provide humanitarian aid to the people of those countries. None of the Kuwaiti Detainees is or ever has been a member or supporter of al Qaida or the Taliban, or of any terrorist organization, or has ever engaged in or supported

any terrorist or hostile act against the United States. After September 11, local villagers seized the Kuwaiti Detainees, who were then turned over to United States authorities in exchange for financial bounties.[1]

Those assertions are independently supported. U.S. authorities had distributed leaflets promising: "millions of dollars for helping . . . catch Al Qaida and Taliban murderers . . . enough money to take care of your family, your village, your tribe for the rest of your life." (App. 91). Defendants and their subordinates have acknowledged that some of the Guantanamo detainees were probably "victims of circumstance" – in the wrong place at the wrong time – and "probably innocent." (App. 94). *See also* R. Gutman, C. Dickey and S. Yousafzi, *Guantanamo Justice*? Newsweek, July 8, 2002, at 34-37 (an investigative report about five of the Kuwaiti detainees who "may be little more than volunteers for their society's version of faith-based charities" who "wanted to help Afghans suffering from drought and famine and then from the war . . . but discovered, once the conflict began, that they could not get out. And as the war turned against the Taliban," they were "sold" into captivity); G. Miller, *Many Held at Guantanamo Not Likely Terrorists*, Los Angeles Times, Dec. 22, 2002, at 1-1 ("The United States is holding dozens of prisoners at Guantanamo Bay who have no meaningful connection to Al Queda or the Taliban, and were sent to the maximum-security facility over the objections of intelligence officers in Afghanistan who had recommended them for release, according to military sources with direct knowledge of the matter."); S. Taylor, *Guantanamo: A Betrayal of What America Stands For,* National Journal, July 26, 2003, at 2399 ("[T]here are reasons to suspect that a substantial percentage of the 660 [prisoners at Guantanamo] were Arab students and charity workers,

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[1] For purposes of ruling on the government's motion to dismiss, the district court accepted as true petitioners' allegations in the amended complaint. (App. 39).

other civilian non-combatants, or helpless Taliban conscripts who were simply in the wrong place at the wrong time.").

The President has made no determination under section 2 of the Military Order that there is reason to believe that any of the Kuwaiti Detainees is a member of al Qaida or the Taliban or has engaged in or supported terrorism or other acts aimed at injuring the United States. Nevertheless, beginning on January 11, 2002, the Kuwaiti Detainees were forcibly taken and transported thousands of miles by U.S. authorities to Guantanamo. They have been imprisoned there ever since, in small cells and in virtual isolation. They have been subject to constant interrogation.[2] They are apparently allowed out of their cells only two or three times a week in chains for fifteen minutes at a time to shower and exercise. None of the Kuwaiti Detainees has been informed of any charges against him, permitted to meet with his family or counsel, or allowed access to any impartial tribunal, military or civilian, to review whether any basis exists for his detention.

3. Guantanamo

In 1903, in withdrawing its forces after the Spanish-American War, the United States entered into a lease with the newly formed Republic of Cuba for the territory that now forms Guantanamo. The lease continues in perpetuity unless both parties agree to terminate it. The United States has indicated its intention to continue the lease indefinitely. The lease provides:

[2] According to a statement made by Secretary of Defense Donald Rumsfeld on February 27, 2002, over 18 months ago, the United States at that point had finished the process of interrogating the detainees for intelligence purposes and had begun interrogating them for criminal prosecution. (App. 97).

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [the military base at Guantanamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain. . . .[3]

Guantanamo exceeds 45 square miles. "The base is entirely self-sufficient, with its own water plant, schools, transportation, and entertainment facilities."[4] The U.S. courts exercise criminal jurisdiction over both U.S. citizens and foreign nationals at Guantanamo.[5] On its official "web" site, the United States Navy has described Guantanamo as "a Naval reservation, which, for all practical purposes, is American territory. Under the [lease] agreements, the United States has for approximately [one hundred] years exercised the essential elements of sovereignty over this territory, without actually owning it."[6]

[3] Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418.

[4] G. L. Neuman, *Anomalous Zones*, 48 Stan. L. Rev. 1197 n.5 (1996).

[5] *See United States v. Lee*, 906 F.2d 117 (4th Cir. 1990) (Jamaican National); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. citizen working at Guantanamo).

[6] *See The History of Guantanamo Bay: An Online Edition* (1964), available at http://www.nsgtmo.navy.mil/history.htm ("U.S. Navy Website").

(B) Proceedings in the District Court

The Kuwaiti Detainees sought modest relief: that they be informed of the charges, if any, against them; that they be allowed to meet with their families and counsel; and that they be afforded access to an impartial tribunal to review whether any basis exists for their continued detentions. They asked for those rights subject to any restrictions that might reasonably be necessary to protect national security. They alleged that the denial of these rights violates the Constitution, international law and treaties of the United States, and is arbitrary, capricious, and contrary to federal law and regulations under the Administrative Procedure Act ("APA"). They sued under 28 U.S.C. §§ 1331, 1350 and 1361.

For jurisdictional purposes, the district court consolidated this case with habeas corpus petitions filed for British and Australian prisoners at Guantanamo. The government moved to dismiss for lack of jurisdiction. The district court dismissed with prejudice. (App. 70-71).

(C) The D.C. Circuit Opinion

On March 11, 2003, the D.C. Circuit affirmed the district court's decision, largely on the basis of this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, this Court held that 21 German "enemy aliens" who had been represented by counsel and were charged, tried and convicted of war crimes by a military tribunal and imprisoned in Germany were not entitled to challenge their convictions by habeas proceedings in the civilian courts. The D.C. Circuit assumed that the Kuwaiti Detainees are not "enemy aliens" and have not engaged in hostilities against the United States (App. 11), but it read *Eisentrager* to mean that "constitutional rights . . . are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens." (App. 13). As a result, the D.C. Circuit concluded that "no court in this country has jurisdiction to grant habeas relief" to the detainees. (App. 14).

Further, the D.C. Circuit held that, even if the Kuwaiti Detainees' claims "do not sound in habeas," the "courts are not open to them." (App. 20-21). It read *Eisentrager* as establishing broadly that "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign'" (App. 20) and as entailing the still broader rule that foreign nationals "without property or presence in this . . . [sovereign territory have] no constitutional rights, under the due process clause or otherwise." (App. 14). The court rejected the argument that, even if *Eisentrager* supported these sweeping propositions, they could not be extended to foreign nationals held at Guantanamo because the United States exercises complete control and jurisdiction there. (App. 18). The court held that Cuba's technical "sovereignty" over Guantanamo, rather than United States jurisdiction and control, was determinative. (App. 17-19).

REASONS FOR ALLOWANCE OF THE WRIT

There is no doubt that the manner in which the government is holding the Kuwaiti Detainees – incarcerating them for more than a year and a half without charge or access to their families or counsel or to any impartial tribunal to determine whether there is a basis for their detention – is radically at odds with any constitutional regimen of due process or the rule of law. Moreover, it is in direct violation of the government's own regulations.[7]

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[7] *See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, U.S. Army Regulation 190-8, Chapter 1-5, para. a, Applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps, Washington, D.C. (1 October 1997) ("All persons taken into custody by U.S. forces will be provided with the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") until some legal status is determined by competent authority."); *id.* at 1-6 para. b ("a competent tribunal shall determine the status of any person . . . concerning whom any doubt . . . exists"); *id.* at 1-6 para. g ("Persons who have been determined by a

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Nevertheless, the D.C. Circuit ruled that the Kuwaiti Detainees have no right to complain to our courts because they are foreigners whom the government has chosen to jail outside U.S. sovereign territory.

It has been two years since terrorists savagely attacked our nation. That attack exposed our vulnerability to a new type of enemy, one more amorphous than those we have faced in the past. All Americans should support whatever actions are necessary to protect our national security. As with the threats we have faced in the past, however, this new threat requires us to draw a balance between security and the nation's founding principles of constitutional order, fundamental fairness and liberty. The essential question raised by this case is whether the courts have any role to play in striking that balance – or, more precisely, in ensuring that a balance is struck. According to the government, the answer to that question is "no" – at least with respect to foreign nationals it chooses to hold outside U.S. sovereign territory. The D.C. Circuit agreed.

The D.C. Circuit's decision raises questions that go to the heart of our constitutional separation of powers, the proper role of the executive and judicial branches in times of crisis, and the obligations we owe to citizens of allied nations. Those questions can be decided only by this Court. They should be decided now, for the war on terrorism can be expected to last a very long time, and the

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competent tribunal not to be entitled to prisoner of war status may not be . . . imprisoned or otherwise penalized, without further proceedings to determine what acts they have committed and what penalty should be imposed."); *id.* at 3-8, para. d ("Accused persons will be notified promptly of the charges in writing. . . . These persons will be tried as soon as possible."); U.S. Department of the Army Field Manual, FM 3-19.40, 1-10 (1 August 2001) ("A person in the custody of US armed forces . . . is treated as an EPW [enemy prisoner of war] until a legal status is ascertained by competent authority."); *id.* at 4-33 ("A tribunal is held according to Article 5, GPW. It determines the status of an individual who does not appear to be entitled to EPW status. . . . "). (App. 80-83).

standards set now will prescribe the nation's behavior for years to come.

1. The Decision Grants the Executive Unprecedented Authority to Define Federal Court Jurisdiction.

It has been established for 200 years that the courts are the guardians of this country's fundamental legal principles, empowered to test the legality of actions taken by the coordinate branches of government. The courts, of course, may determine that certain acts of Congress or the executive are non-justiciable and beyond review. But the authority to determine the boundaries of judicial jurisdiction rests with the judiciary itself. It is for the courts and not the executive to determine whether executive action is subject to judicial review.

The D.C. Circuit decision would change that. By establishing a mechanical rule that makes court jurisdiction turn solely on where the prisoners are held, that decision would enable the executive to manipulate the boundaries of judicial authority so as to avoid court review of governmental actions. Executive branch officials would have the power to divest the courts of jurisdiction simply by choosing to hold aliens outside U.S. sovereign territory.

That appears to be have been the purpose here. The government loaded the detainees on planes in Pakistan and Afghanistan and flew them halfway around the world. Instead of landing the planes at an available facility in the United States, it chose to stop 90 miles short of our borders. By making that choice, it says it has divested the courts of jurisdiction.

But it is not for the executive branch to define the jurisdiction of the federal courts. The protections our system provides against unwarranted governmental intrusion into personal liberty are found not only in the guarantees of the Bill of Rights. The most basic protection arises from the separation of powers among the branches of our government and from the principle of legality – the rule of law – founded in the Common Law. The executive

may never be above the law. A purported executive power to detain people indefinitely and without any legal process deprives the judiciary of its essential function as a check on the power of the executive. To allow the executive untrammeled power over the liberty of persons violates the very essence of the separation of powers that the Constitution's framers implemented to guard against tyranny.

2. The Decision Relieves the Government of Any Obligation to Justify the Necessity of Its Actions.

No one disputes that the government should do everything necessary to protect our nation from terrorism. But it is equally beyond dispute that we cannot allow the threat of terrorism to compromise our fundamental principles of justice, fairness, and government accountability to the rule of law unless this is necessary. A judgment must be made of what is necessary.

That is not a judgment the executive alone should make. The executive's focus is not on protecting personal liberty or preserving our time-honored safeguards against governmental excesses, but on security and appearing to do whatever is possible to increase public safety. In focusing on those objectives, the government can be expected to push its powers to the limit, and beyond. Someone impartial must have authority to examine the executive's actions. That is the traditional role of the judiciary.

Absent federal court jurisdiction, the executive has no need to demonstrate the necessity of its actions. And, indeed, it has made no attempt to do so in this case. It has given no reason why it would threaten our security to allow the detainees to speak with their families, to have access to counsel, or to have some impartial tribunal, military or civilian, review whether there is a basis for their continued detentions. Rather, the government has taken the position that it has no need to explain – because the courts simply have no jurisdiction to examine its actions.

But the courts must have authority to examine those actions. They must have authority to ask of the executive: "Why are these restrictions necessary?" The courts should give deference to the executive's judgment of what is necessary, particularly in times of war or threat to the nation. But they must have the authority to defer, and there must be some showing – some explanation to which deference is due – that the executive's actions are in fact necessary.

It is always more convenient not to explain. But principles of justice and legal order cannot be overridden without a showing of necessity. And the executive cannot evade its duty to make such a showing by spiriting people to prison camps set up outside the zone of technical sovereignty. Court review does not threaten our national security. It does not exalt liberty over security. It simply ensures that a balance will be drawn.

3. The Decision Creates a Rigid Rule that Deprives the Courts of the Ability to Examine the Executive's Actions at Any Time and Under Any Circumstances.

The D.C. Circuit's decision authorizes the government to deprive foreign nationals of all legal rights – and the judiciary of jurisdiction to consider those rights – simply by opting to jail them outside the United States. It does not matter whether the legal rights asserted arise under the Constitution, treaties of the United States, federal common law or the government's own regulations. So long as those jailed are foreigners and the government chooses to jail them outside the area of technical U.S. sovereignty, judicial review is barred under any circumstances.

The D.C Circuit's decision does not depend on a state of war or whether the foreigners detained are enemy combatants. It would apply in times of peace as well as war. It would as clearly authorize executive officials to seize a Canadian off the streets of Toronto in time of peace as an Arab off the streets of Islamabad in time of war. In either case, the officials would not need to explain to any

court why their actions are required to further the nation's security interests, or attempt to reconcile those interests with the commands of legality, fairness, or due process. The government's conduct would be insulated from judicial examination in either case – so long as its prisoners are foreigners jailed outside the United States.

That would be so no matter how long the prisoners are held – for a few months, or a few years, or forever. Under the D.C. Circuit's decision, foreign citizens jailed by the United States outside its sovereign territory without charge, trial or conviction may *never* petition the U.S. courts for relief. Indeed, the Secretary of Defense has said that, even if those detained at Guantanamo are charged, tried and acquitted by a military tribunal, the United States may continue to imprison them. (App. 98-100). Even then, there could be no judicial review.

U.S. officials could also do whatever they want to foreigners jailed outside the United States, denying them not only the most basic procedural protections, but substantive protections as well, including guarantees against discrimination, torture and summary execution. The government could decide to hold only Africans or Irish or Italians or Arabs, or only women or homosexuals, or to deprive them of sleep or food or shelter. No claim could be made. Indeed, the courts would even be barred from considering a claim by detainees that U.S. government officials had suddenly ordered them to be placed before a firing squad and shot, without charge, trial or conviction of any crime.

The question is not whether the government presently means to do any of these terrible things. It is whether the courts will ever have the authority to step in, even when the government appears clearly to have crossed the line of human decency.[8]

[8] In fact, it is not known exactly how the prisoners at Guantanamo are being treated. It is clear that they are not being treated in accordance

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4. The Decision Wrongly Permits Petitioners To Be Imprisoned Indefinitely Without Charges and Without Even a Hearing.

(a) The Decision Turns Petitioners Out of Court Although They Seek Only the Basic Procedural Protections Required by U.S. Law.

Petitioners do not contend that the government lacked power to detain them, nor do they ask for their immediate release. They ask only that, subject to reasonable security measures, they be allowed to meet with their families, consult with counsel, and obtain the judgment of some impartial tribunal as to whether there is cause to detain them. In short, they ask only that the court ensure that adequate procedures are in place so that their detentions are not arbitrary.

The government must clearly have the power to detain and incarcerate foreign nationals who pose a danger to the nation. But there must be some legal process for distinguishing those who are dangerous from those who have been swept up without basis. The Geneva Conventions provide such a procedure, requiring that a Competent Tribunal be convened to review and determine the status of each detainee taken into custody in connection with an armed conflict as to whom there is any doubt.[9] The government's own regulations incorporate those

with the Geneva Conventions. *See* T. Conover, *In the Land of Guantanamo*, The New York Times Magazine, June 29, 2003, at 40; R. Gutman, *A World With Its Own Rules*, Newsweek International, June 30, 2002. Press reports also suggest that the U.S. may be engaging in conduct that violates international rules against cruel, inhuman and degrading treatment. *See* C. Gall and N. A. Lewis, *Tales of Despair from Guantanamo*, New York Times, June 17, 2003, at A-1; *Suicide Attempts Now at 32 for Detainees in Guantanamo*, The Associated Press, August 26, 2003.

[9] Geneva Convention III, Article 5. (App. 84).

requirements and expressly require that such hearings be held.[10]

Those regulations were specifically designed to deal with the capture and detention of aliens abroad. By their terms, they apply to anyone held in U.S. custody, whether or not in U.S. sovereign territory. Yet they have not been followed. Nor has the requirement of the President's Military Order that there must be a written determination of "reason to believe" that a detained foreign national is a member or supporter of al Qaida or of other terrorist organizations.

The process required by the government's regulations for distinguishing between those who are hostile and those who are not is particularly important in this new kind of war – a war on terrorism – precisely because the enemy is not easily identified. He may be dressed like a civilian and may be a citizen of a friendly nation. He may be taken into custody during the affairs of daily life, far from the scene of any visible battle; and this may happen today or next year or ten years hence – for no public ceremonies are conducted to mark the end of a war on terrorism. He may be apprehended and turned over to U.S. authorities by persons having no better reason to do so than opportunism and the hope of bounties. Clearly, however, not all people dressed like civilians are enemies; most citizens of friendly nations are not hostile; and the judgment and discernment of bounty hunters are no satisfactory litmus for distinguishing friend from foe. The danger of mistake is therefore greater, more continuous, more open-ended – as is the need for a process to distinguish and prevent the prolonged and unjustified detention of the innocent.

Petitioners do not contend that an Article III court must itself conduct that process and review the basis for each individual detention. Rather, they contend only that

[10] *See* n.7, *supra*.

some legal process must apply and that the federal courts must have jurisdiction to ensure that one does.

The government apparently recognizes that, if it lodges criminal charges against a detainee at Guantanamo, it must provide at least certain of the basic procedural safeguards ordinarily assured to persons prosecuted for crime. It seems to believe, however, that so long as it does not charge them, it may hold them indefinitely, imprisoning them without any rights whatsoever. But the courts have long rejected the concept that the government may avoid providing basic procedural protections simply by not lodging a charge.[11] The precondition to any extended incarceration must be some impartial examination of the facts and circumstances to determine if a basis exists to deprive a person of liberty. That safeguard, essential to the framers of our Constitution, is well recognized under the Common Law.[12]

As noted, the government's own regulations establish such a procedure for people detained in connection with a

[11] *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 117-18 (1975); *Jackson v. Indiana*, 406 U.S. 715, 737-739 (1972); *Addington v. Texas*, 441 U.S. 418, 425-427 (1979); *Zavydas v. Davis*, 533 U.S. 678, 690 (2001).

[12] *See, e.g., Ex parte Bollman*, 8 U.S. (1 Cranch) 75 (1807). As Alexander Hamilton stated in *The Federalist* No. 84:

> [T]he practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone . . . are well worthy of recital: "To bereave a man of life, [says he] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore A MORE DANGEROUS ENGINE of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the habeas-corpus act, which in one place he calls "the BULWARK of the British Constitution."

war, requiring that impartial hearings be held to determine their status if there is any doubt. Thousands of such hearings have been held in the wars we have waged in recent times, from Viet Nam to Iraq. So far as petitioners can determine, this is the first time the government has refused to abide by its regulations and provide these fundamental safeguards.

(b) The Decision Extends *Eisentrager* Beyond Its Holding or Proper Reach.

This is also the first time the courts have held that people jailed by the United States with no process whatsoever cannot even petition the courts to consider their claims. The D.C. Circuit based that holding almost exclusively on its reading of *Johnson v. Eisentrager*. But the facts of *Eisentrager* are fundamentally different. The Court in *Eisentrager* did not hold that aliens – or even the enemy aliens involved there – could be held indefinitely by U.S. officials without charge, right to counsel or access to an impartial tribunal. To the contrary, the petitioners in that case were tried by a military tribunal and found guilty after receiving those rights.

In *Eisentrager*, 27 German nationals were taken into custody after the end of World War II, formally accused of violating the laws of war, fully informed of the particulars of the charges against them, represented by counsel, and tried before a duly constituted military commission. *See* 339 U.S. at 766, 786. *Six were acquitted* and 21 convicted. *Id.* at 766. The sentences of those convicted were reviewed by a reviewing authority and upheld. *Id.*

One of those convicted petitioned for writs of habeas corpus on behalf of himself and the others. The petitioners did not allege their innocence or allege that they had been denied basic procedural rights. Instead, they alleged that the military commission had no jurisdiction to try them. *See Eisentrager v. Forrestal,* 174 F.2d 961, 963 (D.C. Cir. 1949).

The Supreme Court, in an opinion by Justice Jackson, rejected that contention, stating:

> We hold that the Constitution does not confer a right of personal security or immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States. . . .

339 U.S. at 785. The Court went on to state, *id.* at 786:

> [T]he Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war. . . . The petition shows that these prisoners were formally accused of violating the laws of war and fully informed of particulars of these charges. . . . "[I]f the Military Tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review. . . ."

In reaching that decision, the Court contrasted the litigation rights of citizens and aliens in U.S. courts. It found that, although citizens and resident alien friends enjoy similar civil and property rights, American law had traditionally treated resident *enemy* aliens differently. *Id.* at 768. For example, under the Alien Enemy Act of 1798, a *resident enemy* alien is subject to summary arrest, internment and deportation whenever a declared war exists between his or her native country and the United States, and if placed in custody, is entitled to judicial review only to ascertain whether a state of war exists and whether he or she is an enemy. *Id.* at 773-75. The Court concluded that, unlike a resident enemy alien, the *non-resident enemy* alien, "especially one who has remained in the service of the enemy, does not have [even] this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy." *Id.* at 776. Given this background, the Court declined to extend to the *convicted non-resident enemy aliens* in that case, who "at no relevant time were within any territory over which the United States is sovereign," the use of the habeas corpus process to

challenge in a civilian court their conviction by a duly constituted military tribunal.[13] *Id.* at 779.

In sum, the decision in *Eisentrager* was that non-resident *enemy* aliens, who had been duly represented by counsel and charged, tried, convicted, sentenced and imprisoned after appeal, had no right to challenge their conviction by a military commission in the civil courts through a post-conviction writ of habeas corpus. The D.C. Circuit held, in contrast, that no alien – enemy or friendly – located outside the sovereign territory of the United States may ever petition the U.S. courts for relief from detention without trial or charge, even when denied the most basic procedural due process protections.

Not only is this very far from the Court's holding in *Eisentrager*, it cannot plausibly be supposed to capture the intention of Justice Jackson's majority opinion. Justice Jackson made clear several years later in his dissent in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 209, 218 (1953), that he believed aliens incarcerated by the United States outside the United States are entitled to basic procedural due process protections.

Shaughnessy involved a habeas petition filed by an alien who had been excluded from entry into the United States and then found himself "stranded in his temporary haven on Ellis Island because other countries [would] not take him back." *Id.* at 207. The alien had been excluded by order of the Attorney General under authority expressly granted by Congress to prevent aliens from entering the country without a hearing based on confidential information. *Id.* at 208. The issue before the Court was whether

[13] Nevertheless, the Court emphasized that "the doors of our courts have not been summarily closed upon these prisoners." 339 U.S. at 780. Thus, the Court devoted the final six pages of its opinion to a careful examination of the prisoners' claims and found that their trial by military tribunal, as well as the denial of the right to file a writ challenging their convictions, was fully consistent with both the Constitution and international law. *Id.* at 785-91.

the exclusion "without a hearing amounts to an unlawful detention, so that courts may admit him temporarily to the United States. . . . " *Id.* at 207. The Court held that it did not. The majority emphasized that the power to exclude aliens from entering the country is "a fundamental sovereign attribute . . . largely immune from judicial control." *Id.* at 210. It found nothing in the case transforming it "into something other than an exclusion proceeding." *Id.* at 213.[14] Finding that the petitioner in that case was not being unlawfully detained, but simply excluded from the United States, the Court denied relief.[15]

Justice Jackson, in a dissent joined by Justice Frankfurter, disagreed. He found that the petitioner, confined on Ellis Island with no other place to go, must be regarded as deprived of his liberty and was thus entitled to procedural due process, even if outside the United States:

> Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of

[14] The Court pointed out that "harborage at Ellis Island is not an entry into the United States." 345 U.S. at 213.

[15] The majority did not hold that the alien petitioner in that case was without due process rights. Rather, it found that, with respect to an alien denied initial entry into the United States, "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 212. The majority thus recognized that what process is due an individual depends on the circumstances. For example, the process due individuals captured in the heat of, and held in the immediate aftermath of, battle is clearly different from the process due individuals a year and a half later, thousands of miles from any battlefield, in a place not subject to the exigencies of war and with no end in sight.

> habeas corpus largely to preserve these immunities from executive restraint. Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates.

Id. at 218-19. Justice Jackson carefully distinguished between substantive and procedural due process, concluding that:

> . . . the detention of an alien would not be inconsistent with substantive due process, provided . . . he is accorded procedural due process of law. . . .
>
> Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. . . . Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the government, as they should in matters of policy which comprise substantive law.
>
> . . . . Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. . . . Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to appear on ex parte consideration. . . .
>
> Our law may, and rightly does, place more restrictions on the alien than on the citizen. But basic fairness in hearing procedures does not vary with the status of the accused. . . . If they would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien.

> . . . . [T]he Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process, and as a result the concentration camps were populated with victims of summary executive detention for secret reasons. . . . There are other differences, to be sure, between authoritarian procedure and common law, but the differences in the process of administration make all the difference between a rein of terror and one of law. . . . Such a practice, once established with the best of intentions, will drift into oppression of the disadvantaged in this country as surely as it has elsewhere. . . .
>
> The Communist . . . [threat] poses a problem which sorely tempts the Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else.
>
> Congress has ample authority to determine who we will admit to our shores. . . . The only limitation is that it may not do so by authorizing United States officers to take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges.
>
> It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.

Id. at 224-27. Given those statements, could the D.C. Circuit be correct that Justice Jackson intended in *Eisentrager* to preclude judicial review and basic procedural due process protections to aliens "whose keep, in legal theory, is just outside our gates"? *See id.* at 219.

5. The Decision Wrongly Makes Judicial Jurisdiction, and the Government's Obligation to Obey the Law, Turn On Technical Sovereignty.

This case does not raise the question what rights an alien is due outside U.S. jurisdiction. These petitioners are within U.S. jurisdiction; they are being held in the exclusive custody of U.S. officials in an area wholly under U.S. jurisdiction and control.

There is also no doubt that they are subject to *exclusive* U.S. jurisdiction. The government made sure of that, by transporting them thousands of miles from Pakistan and Afghanistan, to whose courts they might otherwise have made claim, to Guantanamo, where no other courts could possibly intervene. It is the United States, and only the United States, that has jurisdiction over them. And it is the U.S. courts alone to which they can appeal.

The government has never disputed that the United States exercises effective sovereignty over Guantanamo. It exercises "the essential elements of sovereignty over this territory."[16] It is the "supreme authority" there.[17] As the United States Navy has said, Guantanamo, "for all practical purposes, is American territory."[18]

One would expect American laws to apply there, and they do. U.S. civil and criminal laws govern U.S. citizens and non-citizens alike in Guantanamo. A Cuban national wandering onto the base and violating the law would be subject to prosecution and trial on the U.S. mainland.[19] Even animals on Guantanamo are protected by U.S. laws and regulations; anyone, including any federal official,

[16] *See* U.S. Navy Website, n.6, *supra*.

[17] *See* Webster's 9th New Collegiate Dictionary 1128-29 (1988); Blacks Law Dictionary 1568 (4th ed. 1951).

[18] *See* U.S. Navy Website, n.6, *supra*.

[19] *See* n.5, *supra*.

who violates those laws is subject to civil and criminal penalties.[20]

Under the D.C. Circuit decision, however, human beings held prisoner at Guantanamo are not entitled to the same protection as a Cuban iguana: federal officials are free to violate federal laws and regulations with respect to those prisoners, and the courts have no jurisdiction to inquire into the legality of the officials' behavior or the humanity of the prisoners' treatment. The reason: Guantanamo is outside the area of technical U.S. sovereignty. Without technical sovereignty, according to the D.C. Circuit, there can be no judicial review.

Why should that be? Judicial review provides the most fundamental check on the power of the executive arbitrarily to deprive innocent persons of their liberty. It should be coextensive with that power and the danger of the power's susceptibility to abuse. Why should the executive be able to insulate itself from judicial review – and be free to hold innocent people arbitrarily and without justification – simply by resorting to the gimmick of transporting them to a site wholly within U.S. control but technically outside the area of U.S. sovereignty?

Making the government's legal obligations and the courts' jurisdiction terminate at a formal boundary defined by "sovereignty" – something that can be assigned in a property agreement regardless of actual dominion and control over a territory – would encourage manipulation of the legal process. The government could strip the courts of jurisdiction simply by negotiating leases for enclaves abroad in which it gives up meaningless technical sovereignty while acquiring supreme and actual control. The D.C. Circuit decision enables the government to establish penal colonies for foreigners outside the United States that are totally outside the law.

[20] *See* 16 U.S.C. § 1531 *et seq.*; 48 Fed. Reg. 28460-28464 (June 22, 1983).

6. The D.C. Circuit's Decision is in Conflict With Decisions of Other Circuits.

As the D.C. Circuit acknowledged, the Second Circuit had come to a contrary decision regarding the rights of aliens at Guantanamo. In *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, 1341-45 (2d Cir. 1992), *vacated as moot*, 509 U.S. 918 (1993),[21] the Second Circuit held that Haitians interdicted by the United States on the high seas and transported to and detained at Guantanamo had a right not to be returned to Haiti without a fair adjudication as to whether they were *bona fide* asylees.

The Second Circuit expressly distinguished *Eisentrager*, pointing out that *Eisentrager*, "which involved convicted, enemy aliens in occupied territories outside the United States," does not resolve the question of whether "the fifth amendment applies to non-accused, non-hostile aliens held *incommunicado* on a military base within the *exclusive* control of the United States, namely Guantanamo Bay." 969 F.2d at 1343. (Emphasis added). The Second Circuit added: "It does not appear to us to be incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States,"

[21] After the Second Circuit issued its decision, and the United States petitioned for certiorari, the Supreme Court vacated the decision as moot under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993). However, judicial opinions that are vacated under a *Munsingwear* order continue to have "'persuasive authority.'" *Kurtz v. Baker*, 644 F. Supp. 613, 621 (D.D.C. 1986) (quoting from *County of Los Angeles v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting)). *Accord, Edwards v. Madigan*, 281 F.2d 73, 78 n.3 (9th Cir. 1960). Indeed, the Second Circuit's views about the Guantanamo Bay Naval Base continue to be cited with approval. *See United States v. Corey*, 232 F.3d 1166, 1172 (9th Cir. 2000). *Cf. United States v. Gatlin*, 216 F.3d 207, 214 n.8 (2d Cir. 2000).

especially "given the undisputed applicability of federal criminal laws to incidents that occur there and the apparent familiarity of the governmental personnel at the base with the guarantees of due process, fundamental fairness and humane treatment that this country purports to afford to all persons." *Id.*[22]

Courts in other circuits have also held that foreign nationals in territories over which the United States exercises *de facto* control, but lacks technical sovereignty, have access to the U.S. courts. *See Government of the Canal Zone v. Scott*, 502 F.2d 566, 568-69 (5th Cir. 1974) (Canal Zone); *Juda v. United States*, 6 Cl. Ct. 441, 458 (1984) (Marshall Islands); *United States v. Tiede*, 86 F.R.D. 227, 242, 244 (Ct. Berlin 1979) (West Berlin).

7. The D.C. Circuit's Decision Places U.S. Law in Conflict with the Law of Other Civilized Nations.

Courts in other nations have firmly rejected the contention, adopted by the D.C. Circuit here, that governments may insulate themselves from court review and from the obligation to provide basic procedural protections, by detaining individuals outside their sovereign territory.

That contention has been squarely rejected by the courts of England. As the English Court of Appeal recently stated in a case brought by one of the Guantanamo detainees:

[22] *See Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1041-43 (E.D.N.Y. 1993):

> These Haitians are at a military base solely because defendants chose to take them there.... If the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin.

> The United Kingdom and the United States share a great legal tradition, founded in the English common law. One of the cornerstones of that tradition is the ancient writ of habeas corpus, recognized at least by the time of Edward I, and developed by the 17th Century into "the most efficient protection yet developed for the liberty of the subject. . . . "
>
> This principle applies to every person, British citizen or not, who finds himself within the jurisdiction of the court: "He who is subject to English law is entitled to its protection." . . . It applies in war as in peace; in Lord Atkin's words (written in one of the darkest periods of the last war):
>
> > "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace."

Abbasi v. Secretary of State for Foreign and Commonwealth Affairs, EWCA CIZ. 1598 (2002), 2003 U.K.H.R.R. 76. *See also Ex parte Menwa*, 1 QB 241 (1960) (a writ may issue in Northern Rhodesia, a "foreign country within which Her Majesty has power and jurisdiction by treaty" because the writ may issue to any place under the "subjection" of the Crown); *R. v. Secretary of State for the Home Department ex parte Khawaja*, AC 74 (1984); *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, QB 1067 (2001); *Rex v. Cowle*, 2 Burr 834 (1759) (Mansfield, C.J.).

Judicial review of executive detention has also become a fundamental requirement of international law. For example, the International Covenant of Civil and Political Rights ("ICCPR"), to which the United States is a party, expressly provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that a court may decide without delay on the lawfulness of his detention. . . .

ICCPR, Art. 9, § 4. (App. 86).[23] International courts and commissions have uniformly held that states must provide these guarantees to all individuals subject to their jurisdiction and control, even if those individuals are outside their territory. *See, e.g., Sergio Euben Lopez Burgos v. Uruguay*, U.N. Doc. Supp. No. 40 (A/36/40) (June 6, 1979) ("It would be unconscionable . . . to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its territory."); *Ocalan v. Government of Turkey*, Eur. Ct. H.R. (Mar. 2003) (a leader of the Kurdish resistance in Kenya "was under effective Turkish authority and therefore was brought within the 'jurisdiction' of that state for purposes of" the European Convention of Human Rights); *Cyprus v. Turkey*, 4 Eur. H.R. Rep. 482 (1982) (states are "bound to secure the said rights and freedoms of all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad"); *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513 (1997) (a "state cannot insulate itself from Convention scrutiny by operating beyond state frontiers").

Does U.S. law depart so fundamentally from that of other civilized nations?

8. The Decision is Inconsistent with Other Decisions of This Court.

This Court has emphasized that a strong presumption exists that the courts have jurisdiction to review constitutional challenges to executive action, particularly when those actions deprive individuals of their liberty, and that this presumption may be overcome only by clear and

---

[23] *See, e.g.*, American Declaration on the Rights and Duties of Man ("ADRDM"), Art. XXV, O.A.S. T.S., 11 U.N.T.X. 123 (1948); American Convention on Human Rights, Art. 7(5), O.A.S. T.S. No. 36, 1144 (1969); United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, May 2, 1948, OEA/Ser. L/V/I.4 Rev. (1988), 11(1). (App. 87-90).

unequivocal statutory preclusion of jurisdiction. *See, e.g., Demore v. Kim*, 123 S. Ct. 1708, 1714 (2003); *I.N.S. v. St. Cyr*, 533 U.S. 289, 298-99 (2001); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Davis v. Passman*, 442 U.S. 228, 241-42 (1979); *Territory of Guam v. Olsen*, 431 U.S. 195, 203-04 (1977). There has been no showing here of any preclusion – let alone clear and unequivocal preclusion – of jurisdiction.

This Court has also explicitly recognized that foreign nationals located outside U.S. sovereign territory are entitled to protection under the Fifth Amendment at least to the extent that they may not be subjected to personal jurisdiction by this country's courts "under circumstances that would offend 'traditional notions of fair play and substantial justice.'" *See Asahi Metal Industry Co. v. Superior Ct. of California*, 480 U.S. 102, 113 (1987). Are foreign nationals who have been subjected to physical confinement by this country's government not entitled to be treated in accordance with the same "traditional notions of fair play and substantial justice"?

9. The Decision Grants the Government Unprecedented Authority Over Citizens of Allied Nations.

According to the D.C. Circuit, there is no relevant distinction between citizens of enemy and friendly nations; they may be treated the same, so long as they are held in custody outside the zone of U.S. sovereignty. That is an unprecedented ruling, exposing citizens of our allies to summary capture, deportation and detention, all without charge, hearing or judicial protection.

The D.C. Circuit based that ruling on its reading of *Eisentrager*. But the petitioners in *Eisentrager* were all alien enemies – citizens of a hostile nation at war with the United States – a fact emphasized throughout the opinion. As Justice Jackson pointed out, the restrictions imposed upon the enemy alien arise because "his nation takes up

arms against us." 339 U.S. at 771. Justice Jackson emphasized the point again in his dissent in *Shaughnessy*: "The alien enemy may be confined . . . because hostility is *assumed* from his continued allegiance to a hostile state." 345 U.S. at 223 (emphasis added). No such assumption can be made with respect to the Kuwaiti Detainees who are citizens of a friendly state.

Clearly, in the war on terrorism, our enemies do not always wear uniforms, and they may be citizens of hostile states or of our closest friends. Unlike a citizen of an enemy nation, however, one cannot assume enmity on the part of a citizen of a friendly nation. Justice Jackson pointed out in *Eisentrager* that even enemy aliens, if resident in the United States, are entitled to a hearing to determine if they are in fact enemies, because one cannot be certain of their allegiance. 339 U.S. at 778. Should presumably friendly aliens not be entitled to that much?

It may be that U.S. government officials are free outside our sovereign territory to treat citizens of other nations, friend and foe, without regard to our "traditional notions of fair play and substantial justice." *See Asahi*, 480 U.S. at 113. That was clearly not Justice Jackson's view. In any event, if that is to be so, it should be decided squarely by this Court and not simply assumed from dicta in other cases decided in other circumstances on the basis of other facts.

CONCLUSION

This case raises questions that test the character of our nation and our standing in the world community. We are a nation, unlike others, bound together not by race or creed, but by principles. Chief among those are democracy, individual liberty and the rule of law. These are our birthright, and also our responsibility. They are our most powerful symbols abroad and a major source of our respect and strength among the community of nations. Court review is essential both to preserve those principles and to assure our friends around the world that these principles

will not be abandoned without at least review by the highest Court in the land.

Petitioners respectfully request that this Court grant *certiorari*.

Respectfully submitted,

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
HEATHER LAMBERG KAFELE

SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 508-8000
Facsimile: (202) 508-8100
Attorneys for Petitioners

Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
HEATHER LAMBERG KAFELE

SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-508-8000
Facsimile: 202-508-8100
Attorneys for Petitioners

September 2, 2003

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 2, 2002 Decided March 11, 2003

No. 02-5251

KHALED A. F. AL ODAH, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.,
APPELLEES

Consolidated with
Nos. 02-5284, 02-5288

Appeals from the United States District Court
for the District of Columbia
(02cv00299)
(02cv00828)
(02cv01130)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Thomas B. Wilner and Joseph Margulies argued the cause for appellants. With them on the briefs were *Neil H. Koslowe*, *Michael Ratner*, *Beth Stephens*, and *L. Barrett Boss*.

William J. Aceves was on the briefs of *amici curiae* The International Centre for the Legal Protection of Human Rights and International Human Rights Organizations and Law Scholars in support of appellants.

David P. Sheldon was on the brief of *amicus curiae* National Association of Criminal Defense Lawyers in support of appellants.

Paul D. Clement, Deputy Solicitor General, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Roscoe C. Howard, Jr.*, U.S. Attorney, *Gregory G. Katsas*, Deputy Assistant Attorney General, U.S. Department of Justice, *Gregory G. Garre* and *David B. Salmons*, Assistants to the Solicitor General, *Douglas N. Letter*, *Robert M. Loeb* and *Katherine S. Dawson*, Attorneys.

Daniel J. Popeo, *Richard A. Samp* and *Paul D. Kamenar* were on the brief for *amici curiae* Washington Legal Foundation, *et al.*, in support of appellees.

Before: RANDOLPH and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: Through their "next friends," aliens captured abroad during hostilities in

Afghanistan and held abroad in United States military custody at the Guantanamo Bay Naval Base in Cuba brought three actions contesting the legality and conditions of their confinement. The ultimate question presented in each case is whether the district court had jurisdiction to adjudicate their actions.

I.

The Constitution, as its preamble also declares, empowers Congress to "provide for the common Defence." U.S. CONST. art. I, § 8. To that end, the Constitution gives Congress the power "To raise and support Armies," "To provide and maintain a Navy," "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." *Id.* To that end as well, the Constitution invests the President with the "executive Power," and makes him "Commander in Chief" of the country's military. Art. II, §§ 1 & 2; *see Ex parte Quirin*, 317 U.S. 1, 25-26 (1942).

In response to the attacks of September 11, 2001, and in the exercise of its constitutional powers, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks and recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001). The President declared a national emergency, Proclamation No. 7453, Declaration of a National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48,199 (Sept. 14, 2001), and,

as Commander in Chief, dispatched armed forces to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported and protected it. During the course of the Afghanistan campaign, the United States and its allies captured the aliens whose next friends bring these actions.

In one of the cases (*Al Odah v. United States*, No. 02-5251), fathers and brothers of twelve Kuwaiti nationals detained at Camp X-Ray in Guantanamo Bay brought an action in the form of a complaint against the United States, President George W. Bush, Secretary of Defense Donald H. Rumsfeld, Chairman of the Joint Chiefs of Staff Gen. Richard B. Myers, Brig. Gen. Rick Baccus, whom they allege is the Commander of Joint Task Force 160, and Col. Terry Carrico, the Commandant of Camp X-Ray/Camp Delta. None of the plaintiffs' attorneys have communicated with the Kuwaiti detainees. The complaint alleges that the detainees were in Afghanistan and Pakistan as volunteers providing humanitarian aid; that local villagers seeking bounties seized them and handed them over to United States forces; and that they were transferred to Guantanamo Bay sometime between January and March 2002. A representative of the United States Embassy in Kuwait informed the Kuwaiti government of their whereabouts. Invoking the Great Writ, 28 U.S.C. §§ 2241-2242; the Alien Tort Act, 28 U.S.C. § 1350; and the Administrative Procedure Act, the *Al Odah* plaintiffs claim a denial of due process under the Fifth Amendment, tortious conduct in violation of the law of nations and a treaty of the United States, and arbitrary and unlawful governmental conduct. They seek a declaratory judgment and an injunction ordering that they be informed of any charges against

them and requiring that they be permitted to consult with counsel and meet with their families.

Rasul v. Bush (No. 02-5288) is styled a petition for a writ of habeas corpus on behalf of three detainees, although it seeks other relief as well. The next friends bringing the petition are the father of an Australian detainee, the father of a British detainee, and the mother of another British detainee. Respondents are President Bush, Secretary Rumsfeld, Col. Carrico, and Brig. Gen. Michael Lehnert, who is alleged to be the Commander of Joint Task Force 160. The petition claims that the Australian detainee was living in Afghanistan when the Northern Alliance captured him in early December 2001; that one of the British detainees traveled to Pakistan for an arranged marriage after September 11, 2001; and that the other British detainee went to Pakistan after that date to visit relatives and continue his computer education. The next friends learned of their sons' detention at Guantanamo Bay from their respective governments. The *Rasul* petitioners claim violations of due process under the Fifth and Fourteenth Amendments, international law, and military regulations; a violation of the War Powers Clause; and a violation of Article I of the Constitution because of the President's alleged suspension of the writ of habeas corpus. They seek a writ of habeas corpus, release from unlawful custody, access to counsel, an end to interrogations, and other relief.

Habib v. Bush (No. 02-5284) is also in the form of a petition for writ of habeas corpus and is brought by the wife of an Australian citizen, acting as his next friend. Naming President Bush, Secretary Rumsfeld, Brig. Gen. Baccus, and Lt. Col. William Cline as defendants, the petition alleges that Habib traveled to Pakistan to look for

employment and a school for his children; that after Pakistani authorities arrested him in October 2001, they transferred him to Egyptian authorities, who handed him over to the United States military; and that the military moved him from Egypt to Afghanistan and ultimately to Guantanamo Bay in May 2002. Australian authorities visited Guantanamo and issued a press release confirming Habib's presence there. The *Habib* petition, like the other two cases, invokes the Due Process Clause of the Fifth Amendment and other constitutional provisions, the Alien Tort Act, the Administrative Procedure Act, due process under international law, and United States military regulations. Habib seeks a writ of habeas corpus, legally sufficient process to establish the legality of his detention, access to counsel, an end to all interrogations of him, and other relief.

The district court held that it lacked jurisdiction. Believing no court would have jurisdiction, it dismissed the complaint and the two habeas corpus petitions with prejudice. *Rasul v. Bush*, 215 F. Supp. 2d 55, 56 (D.D.C. 2002). In the court's view all of the detainees' claims went to the lawfulness of their custody and thus were cognizable only in habeas corpus. *Id.* at 62-64. Relying upon *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the court ruled that it did not have jurisdiction to issue writs of habeas corpus for aliens detained outside the sovereign territory of the United States. *Rasul*, 215 F. Supp. 2d at 72-73.

II.

While these cases were pending, the Ninth Circuit affirmed an order dismissing a habeas corpus petition for all Guantanamo detainees on the ground that those

bringing the action – clergy, lawyers, and law professors – were not proper "next friends." *Coalition of Clergy, Lawyers & Law Professors v. Bush*, 310 F.3d 1153, 1165 (9th Cir. 2002). In the cases before us, the government does not question the "next friend" status of the individuals prosecuting the actions, at least insofar as they seek writs of habeas corpus. There is a long history, going back to the 1600s in England, of "next friends" invoking the Great Writ on behalf of prisoners who are unable to do so because of their inaccessibility. *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990). For the federal courts, Congress codified the practice in 1948: a habeas corpus petition now may be brought "by the person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242. The next friends in these cases have demonstrated through affidavits that they are "truly dedicated to the best interests of these individuals," that they have a "significant relationship" with the detainees, and that the named detainees are inaccessible. *Whitmore*, 495 U.S. at 163-64. We shall therefore treat the cases as if the detainees themselves were prosecuting the actions. *Id.* at 163.

In each of the three cases, the detainees deny that they are enemy combatants or *enemy* aliens. Typical of the denials is this paragraph from the petition in *Rasul*:

> The detained petitioners are not, and have never been, members of Al Qaida or any other terrorist group. Prior to their detention, they did not commit any violent act against any American person, nor espouse any violent act against any American person or property. On information and belief, they had no involvement, direct or indirect, in either the terrorist attacks on the United

> States September 11, 2001, or any act of international terrorism attributed by the United States to al Qaida or any terrorist group.

(As the district court pointed out, an affidavit from the father of the Australian detainee in *Rasul* admitted that his son had joined the Taliban forces. *Rasul*, 215 F. Supp. 2d at 60 n.6.) Although the government asked the district court to take judicial notice that the detainees are "enemy combatants," the court declined and assumed the truth of their denials. *Id.* at 67 n.12.

This brings us to the first issue: whether the Supreme Court's decision in *Johnson v. Eisentrager*, which the district court found dispositive, is distinguishable on the ground that the prisoners there were "enemy aliens." In the two and a half years leading up to the 1950 *Eisentrager* decision, "German enemy aliens confined by American military authorities abroad" filed more than 200 habeas corpus petitions invoking the Supreme Court's original jurisdiction. 339 U.S. at 768 n.1. The Court denied each petition, often with four Justices announcing that they would dismiss for lack of jurisdiction. *Id.*; *see* Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 593-600 (1949). Justice Jackson, the author of the *Eisentrager* opinion, recused himself from each of the cases, doubtless because of his service (after his appointment to the Court) as Representative and Chief Counsel at the Nazi war crime trials in Nuremberg from 1945 to 1946. *See* Telford Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488 (1955).

Eisentrager differed from the earlier World War II habeas petitions. The case started not in the Supreme Court, but in a district court; and the Germans seeking the writ had not been convicted at Nuremberg. After Germany's

surrender on May 8, 1945, but before the surrender of Japan, twenty-one German nationals in China assisted Japanese forces fighting against the United States. The Germans were captured, tried by an American military commission headquartered in Nanking, convicted of violating the laws of war, and transferred to the Landsberg prison in Germany, which was under the control of the United States Army. 339 U.S. at 765-66. One of the prisoners, on behalf of himself and the twenty others, sought writs of habeas corpus in the United States District Court for the District of Columbia, claiming violations of the Constitution, other laws of the United States, and the 1929 Geneva Convention. *Id.* at 767. The district court dismissed for lack of jurisdiction, but the court of appeals reversed. *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949).

The Supreme Court, agreeing with the district court, held that "the privilege of litigation" had not been extended to the German prisoners. 339 U.S. at 777-78. (Although *Eisentrager* discussed only the jurisdiction of federal courts, state courts do not have jurisdiction to issue writs of habeas corpus for the discharge of a person held under the authority of the United States. *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872).) The prisoners therefore had no right to petition for a writ of habeas corpus: "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U.S. at 778. Moreover, "trials would hamper the war effort and bring aid and comfort to the enemy." *Id.* at 779. Witnesses, including military officials, might have to travel to the

United States from overseas. Judicial proceedings would engender a "conflict between judicial and military opinion" and "would diminish the prestige of" any field commander as he was called "to account in his own civil courts" and would "divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Id.*

The detainees here are quite right that throughout its opinion, the Supreme Court referred to the *Eisentrager* prisoners as "enemy aliens." The petitioners in *Habib* and *Rasul* distinguish themselves from the German prisoners on the ground that they have not been charged and that the charges in *Eisentrager* are what rendered the prisoners "enemies." For this they rely on Justice Brennan's dissenting opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 290-91 (1990). Brief for Appellants at 29 (No. 02-5284 et al.). *Eisentrager*, Justice Brennan wrote, "rejected the German nationals' efforts to obtain writs of habeas corpus not because they were foreign nationals, but because they were enemy soldiers." 494 U.S. at 291 (Brennan, J., dissenting). This seems to us doubly mistaken. In the first place, the German prisoners were not alleged to be "soldiers." They were civilian employees of the German government convicted of furnishing intelligence to the Japanese about the movement of American forces in China. *Eisentrager*, 339 U.S. at 765-66; *Eisentrager*, 174 F.2d at 962. In the second place, it was not their convictions – which they contested – that rendered them "enemy aliens." The Supreme Court made this explicit: "It is not for us to say whether these prisoners were or were not guilty of a war crime," 339 U.S. at 786; "the petition of these prisoners admits[ ] that they are really alien enemies," *id.* at 784. The Court's description of the prisoners as "enemy aliens" rested instead on their

status as nationals of a country at war with the United States. *Id.* at 769 n.2 (quoting *Techt v. Hughes*, 229 N.Y. 222, 229 (1920) (Cardozo, J.)). (Although Germany surrendered in 1945, the state of war with Germany did not end until October 19, 1951. Pub. L. No. 82-181, 65 Stat. 451; *see United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347, 348 (1952) (per curiam).) This is the time-honored meaning of the term. "Every individual of the one nation must acknowledge every individual of the other nation as his own enemy – because the enemy of his country." *The Rapid*, 12 U.S. (8 Cranch) 155, 161 (1814); *see Guessefeldt v. McGrath*, 342 U.S. 308 (1952); *Lamar v. Browne*, 92 U.S. 187, 194 (1875); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1406 (1992); *see also* The Alien Enemy Act of 1798, 50 U.S.C. §§ 21-24. Despite the government's argument to the contrary, it follows that none of the Guantanamo detainees are within the category of "enemy aliens," at least as *Eisentrager* used the term. They are nationals of Kuwait, Australia, or the United Kingdom. Our war in response to the attacks of September 11, 2001, obviously is not against these countries. It is against a network of terrorists operating in secret throughout the world and often hiding among civilian populations. An "alien friend" may become an "alien enemy" by taking up arms against the United States, but the cases before us were decided on the pleadings, each of which denied that the detainees had engaged in hostilities against America.

Nonetheless the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*. They too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American

military, and they have never had any presence in the United States. For the reasons that follow we believe that under *Eisentrager* these factors preclude the detainees from seeking habeas relief in the courts of the United States.

The court of appeals in *Eisentrager* had ruled that "any person who is deprived of his liberty by officials of the United States, acting under the purported authority of that Government," and who can establish a violation of the Constitution, "has a right to the writ." 174 F.2d at 963. This statement of law, unconstrained by the petitioner's citizenship or residence, by where he is confined, by whom or for what, "necessarily" followed – thought the court of appeals – from the Fifth Amendment's application to "any person" and from the court's view that no distinction could be made between "citizens and aliens." *Id.* at 963-65. As the Supreme Court described it, the court of appeals thus treated the right to a writ of habeas corpus as a "subsidiary procedural right that follows from the possession of substantive constitutional rights." 339 U.S. at 781.

In answer the Supreme Court rejected the proposition "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," *id.* at 783. The Court continued: "If the Fifth Amendment confers its rights on all the world . . . [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in our First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." *Id.* at 784. (Shortly before Germany's

surrender, the Nazis began training covert forces called "werewolves" to conduct terrorist activities during the Allied occupation. *See, e.g.*, http://www.archives.gov/iwg/declassified_records/oss_records_263_wilhelm_hoettl.html.) The passage of the opinion just quoted may be read to mean that the constitutional rights mentioned are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens. That is how later Supreme Court cases have viewed *Eisentrager*.

In 1990, for instance, the Court stated that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 U.S. at 269. After describing the facts of *Eisentrager* and quoting from the opinion, the Court concluded that with respect to aliens "our rejection of the extraterritorial application of the Fifth Amendment was emphatic." *Id.* By analogy, the Court held that the Fourth Amendment did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States. Citing *Eisentrager* again, the Court explained that to extend the Fourth Amendment to aliens abroad "would have serious and deleterious consequences for the United States in conducting activities beyond its borders," particularly since the government "frequently employs Armed Forces outside this country," *id.* at 273. A decade after *Verdugo-Urquidez*, the Court – again citing *Eisentrager* – found it "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Although the Supreme Court's statement in *Verdugo-Urquidez* about the Fifth Amendment was dictum, our court has followed it. In *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this court are firmer still. Citing *Eisentrager*, we held in *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960), that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of the circuit now is that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *see also 32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002).

The consequence is that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not. This much is at the heart of *Eisentrager*. If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty. *Eisentrager* itself directly tied jurisdiction to the extension of constitutional provisions: "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the

Judiciary power to act." 339 U.S. at 771. Thus, the "privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in the country implied protection." *Id.* at 777-78 (emphasis added). In arguing that *Eisentrager* turned on the status of the prisoners as enemies, the detainees do not deny that if they are in fact in that category, if they engaged in international terrorism or were affiliated with al Qaeda, the courts would not be open to them. Their position is that the district court should have made these factual determinations at the threshold, before dismissing for lack of jurisdiction. But the Court in *Eisentrager* did not decide to avoid all the problems exercising jurisdiction would have caused, only to confront the same problems in determining whether jurisdiction exists in the first place.

It is true that after deciding jurisdiction did not exist, the Supreme Court, in part IV of its *Eisentrager* opinion, went on to consider and reject the merits of the prisoners' claims. From this the detainees reason that the Court's holding must have been merely that the military courts, rather than the civilian courts, had jurisdiction to try charges of war crimes, not that the district court lacked jurisdiction to adjudicate the habeas petition. We find it impossible to read the Court's statements – many of which we have already quoted – about the courts not being open to the prisoners as so limited. The discussion in part IV of the Court's opinion was extraneous. The dissenting Justices viewed it as such, calling part IV "gratuitous," "wholly irrelevant," lending "no support whatever to the Court's holding that the District Court was without jurisdiction." 339 U.S. at 792, 794 (Black, J., joined by Douglas and Burton, JJ., dissenting). There is a ready explanation for the *Eisentrager* Court's method. Before

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), the Supreme Court (and the lower federal courts) were not always punctilious in treating jurisdiction as an antecedent question to the merits. The Court in *Steel Co.* acknowledged as much. *See* 523 U.S. at 101. Part IV of *Eisentrager*, whether an advisory opinion (*see* 523 U.S. at 101) or an alternative holding, does not detract from the central meaning of the decision that the district court did not have jurisdiction to issue writs of habeas corpus.

We have thus far assumed that the detainees are not "within any territory over which the United States is sovereign," *Eisentrager*, 339 U.S. at 778. The detainees dispute the assumption. They say the military controls Guantanamo Bay, that it is in essence a territory of the United States, that the government exercises sovereignty over it, and that in any event *Eisentrager* does not turn on technical definitions of sovereignty or territory.

The United States has occupied the Guantanamo Bay Naval Base under a lease with Cuba since 1903, as modified in 1934. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (6 Bevans 1113) ("1903 Lease"); Relations With Cuba, May 9, 1934, U.S.-Cuba, T.S. No. 866 (6 Bevans 1161) ("1934 Lease"). In the 1903 Lease, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the naval base. 1903 Lease, art. III. The term of the lease is indefinite. 1903 Lease, art. I; 1934 Lease, art. III ("So long as the United States of America shall not abandon the said naval station at Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has. . . . ").

The detainees think criminal cases involving aliens and United States citizens for activities at Guantanamo Bay support their position. But those cases arose under the special maritime and territorial jurisdiction, *see* 18 U.S.C. § 7. In *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990) (per curiam), a Jamaican national was charged with committing a crime at Guantanamo. The indictment invoked the special maritime and territorial jurisdiction of the United States pursuant to 18 U.S.C. § 7 and 18 U.S.C. § 3238. *Id.* at 117 n.1. Extension of federal criminal law pursuant to these provisions does not give the United States sovereignty over Guantanamo Bay any more than it gives the United States sovereignty over foreign vessels destined for this country because crimes committed onboard are also covered. *See* 18 U.S.C. § 7(8).

The text of the leases, quoted above, shows that Cuba – not the United States – has sovereignty over Guantanamo Bay. This is the conclusion of *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995). The Eleventh Circuit there rejected the argument – which the detainees make in this case – that with respect to Guantanamo Bay " 'control and jurisdiction' is equivalent to sovereignty." *Id.* at 1425. The Supreme Court reached the same conclusion in *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948). In holding that a naval base in Bermuda, controlled by the United States under a lease with Great Britain, was outside United States sovereignty, the Court took notice of the lease with Cuba for the Guantanamo Bay Naval Base and the fact that it granted the United States "substantially the same rights as it has in the Bermuda lease." *Id.* at 383. The "determination of sovereignty over an area," the Court held, "is for the legislative and executive departments." *Id.* at 380. The contrary

decision of the Second Circuit, on which the detainees rely – *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot, Sale v. Haitian Centers Council, Inc.*, 509 U.S. 918 (1993) – has no precedential value because the Supreme Court vacated it. The decision was, in any event, at odds with the Supreme Court's reasoning not only in *Vermilya-Brown*, but also in *Spelar v. United States*, 338 U.S. 217 (1949). The Second Circuit's result rested in very large measure on its extraterritorial application of the Fifth Amendment to non-resident aliens, *see* 969 F.2d at 1342-43, a position we rejected in *People's Mojahedin Org. v. Dep't of State*, 182 F.3d at 22, and in *Harbury v. Deutch*, 233 F.3d at 604, and a position we reject again today. And the Second Circuit thought it important that the United States controlled Guantanamo Bay. 969 F.2d at 1342-44. But under *Eisentrager*, control is surely not the test. Our military forces may have control over the naval base at Guantanamo, but our military forces also had control over the Landsberg prison in Germany.

We also disagree with the detainees that the *Eisentrager* opinion interchanged "territorial jurisdiction" with "sovereignty," without attaching any particular significance to either term. When the Court referred to "territorial jurisdiction," it meant the territorial jurisdiction of the United States courts, as for example in these passages quoted earlier: "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act" (339 U.S. at 771); and "the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of United States courts" (*id.* at 778). Sovereignty, on the other hand, meant then – and means now – supreme dominion

exercised by a nation. The United States has sovereignty over the geographic area of the States and, as the *Eisentrager* Court recognized, over insular possessions, *id.* at 780. Guantanamo Bay fits within neither category.

As against this the detainees point to *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977). After World War II, the United Nations designated the United States as administrator of the Trust Territory of Micronesia. *Id.* at 612. No country had sovereignty over the region, but the court treated Micronesia as if it were a territory of the United States, over which Congress could and did exercise its power under Article IV of the Constitution. (The United States did not hold the Trust Territory "in fee simple . . . but rather as trustee," a difference the court considered irrelevant. *Id.* at 619.) The court therefore described the residents of Micronesia as being "as much American subjects as those in other American territories." *Id.* In the Micronesian Claims Act, Congress established a commission to distribute a fund for claims against the United States for damages suffered during World War II. Because Congress intended the Micronesia Trust Territory to be treated as if it were a territory of the United States, the court held that the right of due process applied to the commission's actions. *Id.* at 629-30. Given the premises on which the court acted, its holding is hardly surprising. "Fundamental personal rights" found in the Constitution apply in territories. *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922); *see also Dorr v. United States*, 195 U.S. 138, 148 (1904) (considering the law applicable in the Philippines); 48 U.S.C. § 1421b (Guam). *Ralpho* thus establishes nothing about the sort of *de facto* sovereignty the detainees say exists at Guantanamo. And its reasoning does not justify this court, or any other, to assert habeas

corpus jurisdiction at the behest of an alien held at a military base leased from another nation, a military base outside the sovereignty of the United States.

III.

In addition to seeking relief explicitly in the nature of habeas corpus, the detainees sued for injunctions and declaratory judgments under the Alien Tort Act, 28 U.S.C. § 1350, alleging that the United States is confining them in violation of treaties and international law. The holding in *Eisentrager* – that "the privilege of litigation" does not extend to aliens in military custody who have no presence in "any territory over which the United States is sovereign" (339 U.S. at 777-78) – dooms these additional causes of action, even if they deal only with conditions of confinement and do not sound in habeas. *See Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974); *Brown v. Plaut*, 131 F.3d 163, 167 (D.C. Cir. 1997).

At the time of *Eisentrager*, the writ of habeas corpus extended to prisoners "in custody in violation of the Constitution or of a law or treaty of the United States," 28 U.S.C. § 453 (1946). The current habeas statute, 28 U.S.C. § 2241(c)(3), is very much the same. The prisoners in *Eisentrager* alleged violations of the Constitution, federal laws, and a treaty. So here. Each of the detainees alleges violations of the Constitution, treaties, and laws of the United States. The Alien Tort Act is a "law of the United States" and, the detainees believe, so is some international law. As to the latter, the theories are that federal common law incorporates "customary international law" and that the Alien Tort Act not only provides jurisdiction but also creates a cause of action – theories the Second Circuit

promulgated in *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-87 (2d Cir. 1980). But as we have decided, the detainees are in all relevant respects in the same position as the prisoners in *Eisentrager*. They cannot seek release based on violations of the Constitution or treaties or federal law; the courts are not open to them. Whatever other relief the detainees seek, their claims necessarily rest on alleged violations of the same category of laws listed in the habeas corpus statute, and are therefore beyond the jurisdiction of the federal courts. Nothing in *Eisentrager* turned on the particular jurisdictional language of any statute; everything turned on the circumstances of those seeking relief, on the authority under which they were held, and on the consequences of opening the courts to them. With respect to the detainees, those circumstances, that authority, and those consequences differ in no material respect from *Eisentrager*.

IV.

We have considered and rejected the other arguments the detainees have made to the court. The judgment of the district court dismissing the complaint in No. 02-5251 and the petitions for writs of habeas corpus in Nos. 02-5284 and 02-5288 for lack of jurisdiction is

*Affirmed.**

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* Although Judges Garland and Williams have not joined Judge Randolph's concurring opinion, they do not intend thereby to express any view about its reasoning. They believe the issues addressed need not be reached.

RANDOLPH, *Circuit Judge*, *concurring*:

I write separately to add two other grounds for rejecting the detainees' non-habeas claims. But first some words are in order regarding the Alien Tort Act, 28 U.S.C. § 1350:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Three courts of appeals have decided that § 1350 not only provides a federal forum but also creates a cause of action for violations of the "law of nations." The Second Circuit, in the decision launching this development, held first, that § 1350 conferred jurisdiction over an action by citizens of Paraguay against another citizen of that country for torts allegedly committed in Paraguay; and second, that "customary international law" is part of federal common law. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The same court of appeals later reiterated that § 1350 provided jurisdiction and gave aliens – in this instance, Muslim and Croat citizens of Bosnia-Herzegovina – a cause of action against the leader of the Bosnia Serbs for violations of "the law of nations" and treaties. *Kadic v. Karadzic*, 70 F.3d 232, 241-44 (2d Cir. 1995); *see Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2000). The Ninth Circuit followed suit, holding that § 1350 gave a district court jurisdiction over the estate of the former Philippine President Marcos although all plaintiffs and defendants were Philippine nationals and although the torts, alleged to violate international law, occurred entirely in the Philippines. *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation)*, 978 F.2d 493, 499 (9th Cir. 1992); *see also Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25

F.3d 1467, 1473 (9th Cir. 1994); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-84 (9th Cir. 1998). The Eleventh Circuit joined these courts of appeals in holding that § 1350 not only confers jurisdiction, but also gives federal courts the power to "fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996).

The meaning of § 1350 has been an open question in our court. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring); *id.* at 800 (Bork, J., concurring); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 20-07 (D.C. Cir. 1985). But what § 1350 does not mean has been decided. In the *Tel-Oren* case both Judge Bork and Judge Robb, in their separate concurring opinions, rejected the Second Circuit's *Filartiga* decision, Judge Bork on the ground that § 1350 does not create a cause of action, Judge Robb on the ground that *Filartiga* is "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *See* 726 F.2d at 801 (Bork, J.); *id.* at 826 n.5 (Robb, J.). Since then some of the opinions following *Filartiga* maintain that Congress ratified its interpretation of § 1350. *See, e.g., Kadic*, 70 F.3d at 241; *Hilao*, 25 F.3d at 1475; *Abebe-Jira*, 72 F.3d at 848; *see also* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 224, 256 (1996). The ratification argument rests on enactment of the Torture Victim Protection Act of 1991, which provides a cause of action for damages to anyone – aliens and citizens alike – who suffered torture anywhere in the world at the hands of any individual acting under the law of any foreign nation. 28

U.S.C. § 1350 note. The Torture Victim Act does not contain its own jurisdictional provision. But it is clear that any case brought pursuant to that statute would arise under federal law and thus come within 28 U.S.C. § 1331, the grant of general federal question jurisdiction. (I mean to imply nothing about the constitutionality of the statute.) The Alien Tort Act is thus beside the point: it confers jurisdiction only over suits by aliens and only for violations of treaties and the law of nations. The House Report on the torture victim bill did state that § 1350 "should remain intact to permit suits based on other norms that already exist or may ripen in the future into the rules of customary international law." Torture Victim Protection Act of 1991, H.R. REP. NO. 102-367, pt. 1, at 4 (1991). But the statement of one congressional committee is by no means a statement of "Congress," as some have supposed; the wish expressed in the committee's statement is reflected in no language Congress enacted; it does not purport to rest on an interpretation of § 1350; and the statement itself is legislative dictum.

The detainees, or at least some of them, nevertheless have urged us to follow the *Filartiga* line of cases. I see a number of problems in doing so, in addition to those mentioned by Judges Bork and Robb in *Tel-Oren*. To hold that the Alien Tort Act creates a cause of action for treaty violations, as the *Filartiga* decisions indicate, would be to grant aliens greater rights in the nation's courts than American citizens enjoy. Treaties do not generally create rights privately enforceable in the courts. Without authorizing legislation, individuals may sue for treaty violations only if the treaty is self-executing. *See, e.g., Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d

1101, 1107 (D.C. Cir. 2001); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994); *Holmes v. Laird*, 459 F.2d 1211, 1220 (D.C. Cir. 1972); *Tel-Oren*, 726 F.2d at 808-10 (Bork, J., concurring). To illustrate, the detainees in this case claim that the military is confining them in violation of the Geneva Convention of 1949. But the second Geneva Convention, like the first, *see Eisentrager*, 339 U.S. at 789 n.14, is not self-executing for the reasons stated by Judge Bork in *Tel-Oren*, 726 F.2d at 808-09, and by the Fourth Circuit in *Hamdi v. Rumsfeld*, 316 F.3d 450, 468-69 (4th Cir. 2003). No American citizen, therefore, has a cause of action under this treaty. Yet on the basis of *Filartiga*, and the theory that the Alien Tort Act itself creates a cause of action, aliens could bring suit for its violation. *Martinez*, 141 F.3d at 1383-84, illustrates the point. The Ninth Circuit, relying on § 1350, sustained such a suit, brought by an alien against the City of Los Angeles for actions occurring in Mexico in violation of the "customary international law." The court of appeals derived this "customary international law" partly from the International Covenant on Civil and Political Rights. But the court neglected to mention that this multilateral agreement creates no judicially enforceable rights and that the Senate ratified the treaty on the basis that it "will not create a private cause of action in U.S. courts." S. EXEC. REP. NO. 102-23, at 9, 19, 23 (1992). I find it hard to believe the First Congress, which enacted the Alien Tort Act in 1789, intended to extend to aliens rights of actions withheld from the citizens of this country.

Filartiga's theory that federal common law incorporates customary international law also raises many issues. The theory was necessary to sustain the constitutionality of § 1350 as the Second Circuit interpreted and applied it.

Early in our history the Supreme Court held unconstitutional, in violation of Article III, the conferring of federal jurisdiction over suits by an alien against an alien. *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809). In holding that federal common law somehow incorporates customary international law, the *Filartiga* court placed the case before it on the "arising under" head of jurisdiction without mentioning *Hodgson*. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972). This avoided the difficulty the Supreme Court's decision posed, but it created quite a few difficulties of its own.

For one thing, Article I, section 8, clause 10 of the Constitution gives Congress the power to "define and punish ... Offenses against the Law of Nations." The Framers' original draft merely stated that Congress had the power to punish offenses against the law of nations, but when Gouverneur Morris of Pennsylvania objected that the law of nations was "often too vague and deficient to be a rule," the clause was amended to its present form. III ELLIOT'S DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON 604 (James McClellan & M.E. Bradford eds., rev. ed. 1989). I believe this clause in Article I, section 8, particularly in light of the history just recounted, makes it abundantly clear that Congress – not the Judiciary – is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts. Yet under *Filartiga*, it is the courts, not Congress who decide both questions. It is no answer to say that early Supreme Court cases looked to the "law of nations." The "law of nations" may have been part of the general federal common law in the days before *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), but even then "the law of nations" did not present "any Federal question."

N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286, 286-87 (1875); *see Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442-43 (1924). And for good reason. The political branches of our government may influence but they by no means control the development of customary international law. To have federal courts discover it among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers. As Judge Robb put it, the courts "ought not serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations." *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring). Nothing in the Constitution expressly authorizes such free-wheeling judicial power. After *Erie* brought an end to "general federal common law," federal common law has been mostly interstitial or generated by the need for uniformity throughout the States. *See generally* HENRY J. FRIENDLY, BENCHMARKS 155-95 (1967). A federal common law of customary international law is justified by neither consideration. Congress, when it ratifies treaties, often does so with reservations in order to avoid altering domestic law. Yet treating customary international law as federal law would alter domestic law because of the Supremacy Clause. All of these problems, and more, including the lack of historical support for the *Filartiga* theory, are spelled out in Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), and in a later article by the same authors, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998). *But see* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

As to the history of the Alien Tort Act, Judge Friendly wrote: this "old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). The original version read:

> the district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

1 Stat. 73, 76-77 (1789). Two former members of our court thought that § 1350 might have been meant to cover only private, nongovernmental acts taken against aliens such as piracy. *Sanchez-Espinoza*, 770 F.2d at 206 (Scalia, J.); *Tel-Oren*, 726 F.2d at 813-14, 822 (Bork, J., concurring). "[M]ore recent research of a competent scholar" (*Erie R.R.*, 304 U.S. at 72) has shed new light on the origin of § 1350 and the purpose of the First Congress in enacting it. *See* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445 (1995). Professor Sweeney marshals a vast amount of historical research on eighteenth century "prize law," which allowed private vessels having a marque to capture enemy ships. When the Articles of Confederation were in effect, state courts adjudicated claims by alien shipowners seeking the return of their captured vessels and reparations for the damages caused by the seizure. Adoption of the Constitution and the passage of the First Judiciary Act gave the federal courts exclusive jurisdiction in admiralty and thus exclusive jurisdiction over suits brought to recover ships captured in prize. There was still a question

whether state courts had jurisdiction over cases in which the alien sued not for return of the ship, but only for reparations. It was only these cases, Professor Sweeney postulates, that the Alien Tort Act's author, Oliver Ellsworth, and his congressional colleagues, intended to cover by making clear that if the alien shipowner's suit sought only reparations, the state courts would have jurisdiction concurrent with the federal courts. Hence the words in the statute "for a tort only." If Professor Sweeney is correct, the Alien Tort Act today is moribund, as in fact it had been for nearly two hundred years until the Second Circuit resuscitated it.

In view of my doubts about *Filartiga*, and the *Tel-Oren* majority's rejection of it, we might go ahead in this case and decide what § 1350 does mean. But it is unnecessary to do so, not only because *Eisentrager* disposes of the cases, but also because the detainees' treaty and international law claims are barred by sovereign immunity. Before explaining why, I need to add a disclaimer. At oral argument, the question arose whether next friend status may be recognized for suits under § 1350. "Some courts have permitted 'next friends' to prosecute actions outside the habeas corpus context on behalf of infants, other minors, and adult mental incompetents." *Whitmore v. Arkansas*, 495 U.S. 149, 162 n.4 (1990). Here, the argument for the next friend device is that the detainees are allegedly barred from talking with anyone about bringing lawsuits on their behalf. The parties have not briefed the questions this argument raises and I express no opinion on its validity.

The United States or its officers may be sued only if there is a waiver of sovereign immunity. *See, e.g., Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). We have

held that the Alien Tort Act, whatever its meaning, does not itself waive sovereign immunity. *Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 886 (D.C. Cir. 1992) (per curiam); *Sanchez-Espinoza*, 770 F.2d at 207; *see Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980). The detainees therefore rely on the waiver provision in the Administrative Procedure Act, 5 U.S.C. § 702, which states: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity . . . shall not be dismissed . . . on the ground that it is against the United States. . . ."

Although relying on the APA's waiver for agencies, the detainees do not identify which "agency" of the United States they have in mind. They have sued the President in each case, but the President is not an "agency" under the APA and the waiver of sovereign immunity thus does not apply to him. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). This leaves the military. The APA specifically excludes from its definition of "agency" certain functions, among which is "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. §§ 551(1)(G), 701(b)(1)(G); *see id.* §§ 553(a)(1) & 554(a)(4), exempting military "functions" from the APA's requirements for rulemaking and adjudication; *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 375 n.2 (2d Cir. 1968) (Friendly, J.). The district court ruled, in an alternative holding, that because of the military function exclusion, the APA does not waive sovereign immunity. *Rasul v. Bush*, 215 F. Supp. 2d 55, 64 n.10 (D.D.C. 2002). I believe this is correct.

Each of the detainees, according to their pleadings, was taken into custody by American armed forces "in the field in time of war." I believe they remain in custody "in the field in time of war." It is of no moment that they are now thousands of miles from Afghanistan. Their detention is for a purpose relating to ongoing military operations and they are being held at a military base outside the sovereign territory of the United States. The historical meaning of "in the field" was not restricted to the field of battle. It applied as well to "organized camps stationed in remote places where civil courts did not exist," *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 274 (1960) (Whittaker, J., joined by Stewart, J., concurring in part and dissenting in part). To allow judicial inquiry into military decisions after those captured have been moved to a "safe" location would interfere with military functions in a manner the APA's exclusion meant to forbid. We acknowledged as much in *Doe v. Sullivan*, 938 F.2d 1370, 1380 (D.C. Cir. 1991), when then-Judge Ruth Bader Ginsburg stated for the court that the APA's military function exclusion applied to cases in which a court was asked to "review military commands made . . . in the aftermath of [ ] battle." It is also of no moment that the detainees were captured without Congress having declared war against any foreign state. "Time of war," as the APA uses it, is not so confined. The military actions ordered by the President, with the approval of Congress, are continuing; those military actions are part of the war against the al Qaeda terrorist network; and those actions constitute "war," not necessarily as the Constitution uses the word, but as the APA uses it. *See Campbell v. Clinton*, 203 F.3d 19, 29-30 (D.C. Cir. 2000) (Randolph, J., concurring in the judgment); *Mitchell v. Laird*, 488 F.2d 611, 613 (D.C. Cir. 1973). The detainees are right not to contest this

point. To hold that it is not "war" in the APA sense when the United States commits its armed forces into combat without a formal congressional declaration of war would potentially thrust the judiciary into reviewing military decision-making in places and times the APA excluded from its coverage.

I would therefore hold that the detainees cannot invoke the APA's waiver of sovereign immunity and that the district court correctly dismissed their claims under the Alien Tort Act for this additional reason.

I would also hold that the judicial review provisions of the APA, including the waiver of sovereign immunity, do not apply because the military decisions challenged here are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exclusion applies when "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). The military's judgment about how to confine the detainees necessarily depends upon "'a complicated balancing of a number of factors which are particularly within its expertise.'" *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (quoting *Heckler*, 470 U.S. at 831). The level of threat a detainee poses to United States interests, the amount of intelligence a detainee might be able to provide, the conditions under which the detainee may be willing to cooperate, the disruption visits from family members and lawyers might cause – these types of judgments have traditionally been left to the exclusive discretion of the Executive Branch, and there they should remain. *See Nat'l Fed'n of Fed. Employees v. United States*, 905 F.2d 400, 406 (D.C. Cir. 1990); *Schonbrun*, 403 F.2d at 375 n.2.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL, SKINA BIBI, as Next Friend of Shafiq Rasul, *et al.*, Petitioners, v. GEORGE WALKER BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 02-299 (CKK)
FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	Civil Action No. 02-828 (CKK)

MEMORANDUM OPINION
(Filed July 30, 2002)

I. INTRODUCTION

Presently before the Court are two cases involving the federal government's detention of certain individuals at the United States Naval Base at Guantanamo Bay, Cuba. The question presented to the Court by these two cases is whether aliens held outside the sovereign territory of the United States can use the courts of the United States to

pursue claims brought under the United States Constitution. The Court answers that question in the negative and finds that it is without jurisdiction to consider the merits of these two cases. Additionally, as the Court finds that no court would have jurisdiction to hear these actions, the Court shall dismiss both suits with prejudice.

Throughout their pleadings and at oral argument, Petitioners and Plaintiffs contend that unless the Court assumes jurisdiction over their suits, they will be left without any rights and thereby be held *incommunicado*. In response to this admittedly serious concern, the government at oral argument, conceded that "there's a body of international law that governs the rights of people who are seized during the course of combative activities." Transcript of Motion Hearing, June 26, 2002 ("Tr.") at 92. It is the government's position that "the scope of those rights are for the military and political branches to determine – and certainly that reflects the idea that other countries would play a role in that process." *Id.* at 91. Therefore, the government recognizes that these aliens fall within the protections of certain provisions of international law and that diplomatic channels remain an ongoing and viable means to address the claims raised by these aliens.[1] While

[1] The Court notes that, at least for Petitioner David Hicks in the *Rasul* case, diplomatic efforts by the Australian government have already commenced. First Am. Pet. for Writ of Habeas Corpus ("Am. Pet."), Ex. C., "Affidavit of Stephen James Kenny," Attach. 2 (Letter from Robert Cornall, Australian Attorney-General's Office to Stephen Kenny, counsel for Petitioner Terry Hicks) ("Australia has indicated to the United States that it is appropriate that Mr Hicks remain in U.S. military custody with other detainees while Australia works through complex legal issues and conducts further investigations. . . . Australian

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these two cases provide no opportunity for the Court to address these issues, the Court would point out that the notion that these aliens could be held *incommunicado* from the rest of the world would appear to be inaccurate.

After reviewing the extensive briefings in these cases, considering the oral arguments of the parties and their oral responses to the Court's questions, and reflecting on the relevant case law, the Court shall grant the government's motion to dismiss in both cases on the ground that the Court is without jurisdiction to entertain these claims.[2]

authorities have been granted access to Mr Hicks and will be granted further access if required.").

[2] In reaching its decision in the *Rasul* case, the Court considered the First Amended Petition for Writ of Habeas Corpus, the Exhibits to the Amended Petition for Writ of Habeas Corpus, the Memorandum in Support of the Amended Petition for Writ of Habeas Corpus, Respondents' Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus, Petitioners' Memorandum in Opposition to Respondents' Motion to Dismiss, and Respondents' Reply in Support of Their Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus. In reaching its decision in the *Odah* case, the Court considered the Amended Complaint, Plaintiffs' Motion for a Preliminary Injunction, Plaintiffs' Request for Expeditious Hearing on Plaintiffs' Motion for a Preliminary Injunction and Supporting Statement of the Facts that Make Expedition Essential, Defendants' Motion to Dismiss Plaintiffs' Complaint and Motion for a Preliminary Injunction, Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint and Motion for a Preliminary Injunction, Defendants' Reply in Support of Motion to Dismiss, Plaintiffs' Opposition to Defendants' Motion for Leave to Late File Their Reply In Support of Defendants' Motion to Dismiss and Response to Plaintiffs' Request for Expeditious Hearing, Plaintiffs' Consent Motion for Leave to File Post-Argument Brief Correcting Erroneous Statements by Defense Counsel at Oral Argument, Defendants' Response to Plaintiffs' Post-Argument Brief, and Plaintiffs' Reply to Defendants' Response to Plaintiffs' Post-Argument Brief.

II. PROCEDURAL HISTORY

Petitioners in *Rasul v. Bush,* Civil Action No. 02-299, filed their case on February 19, 2002, and have styled their action as a petition for writ of habeas corpus. Petitioner Shafiq Rasul and Asif Iqbal are citizens of the United Kingdom and are presently held in Respondents' custody at the United States Naval Base at Guantanamo Bay, Cuba. Am. Pet. ¶¶ 10, 14. Petitioner David Hicks is an Australian citizen who is also detained by Respondents at the military base at Guantanamo Bay. *Id.* ¶ 5. Also included in the Petition are Skina Bibi, mother of Shafiq Rasul, Mohammed Iqbal, father of Asif Iqbal, and Terry Hicks, father of David Hicks. Petitioners request, *inter alia,* that this Court "[o]rder the detained petitioners released from respondents' unlawful custody," "[o]rder respondents to allow counsel to meet and confer with the detained petitioners, in private and unmonitored attorney-client conversations," and "[o]rder respondents to cease all interrogations of the detained petitioners, direct or indirect, while this litigation is pending." Am. Pet., Prayer for Relief, ¶¶ 4-6.

Plaintiffs in *Odah v. United States,* Civil Action No. 02-828, filed their action on May 1, 2002. The *Odah* case involves the detention of twelve Kuwaiti nationals who are currently being held in the custody of the United States at the United States Naval Base at Guantanamo Bay, Cuba. Am. Compl. at 4. The action is concurrently brought by twelve of their family members who join the suit and speak on behalf of the individuals in United States custody. *Id.* Unlike Petitioners in *Rasul,* the *Odah* Plaintiffs disclaim that their suit seeks release from confinement.

Rather, Plaintiffs in *Odah* ask this Court to enter a preliminary and permanent injunction prohibiting the government from refusing to allow the Kuwaiti nationals to "meet with their families," "be informed of the charges, if any, against them," "designate and consult with counsel of their choice," and "have access to the courts or some other impartial tribunal." *Id.* ¶ 40.[3] Plaintiffs' Amended Complaint

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[3] After full briefing and oral argument on Defendants' Motion to Dismiss in the *Odah* case, Plaintiffs filed an Amended Complaint, which they filed as of right pursuant to Rule 15 of the Federal Rules of Civil Procedure. In a conference call with the Court, Plaintiffs represented that there were three specific differences between the Amended Complaint and the original Complaint. First, the Amended Complaint added two new plaintiffs to the action, a Kuwaiti national held at the military base at Guantanamo Bay and a member of his family who brings the suit on his behalf. Originally, there had only been twenty-two Plaintiffs. *Compare* Compl. ¶¶ 3, 4, *with* Am. Compl. ¶¶ 3, 4. Second, Plaintiffs abandoned their request that the Court order Defendants to turn Plaintiffs, held at the military base at Guantanamo Bay, over to the Kuwaiti government. Compl. ¶ 44. Third, Plaintiffs made an effort to clarify the four specific requests for relief that they seek in this case. *Compare* Compl. ¶ 42, *with* Am. Compl. ¶ 40.

Ordinarily, when the Court receives an amended complaint after a defendant files a motion to dismiss, it denies the motion to dismiss without prejudice and requests that the defendant re-file the motion based on the allegations presented in the amended complaint. In this case, based on the Court's review of the Amended Complaint, it appears that such a procedure would be a useless exercise since the legal theories underlying Defendants' present motion to dismiss will not be affected by the filing of the Amended Complaint. Defendants agree with the Court and contend that the amendments will not impact upon the Court's ruling on the motion to dismiss. Accordingly, the Court will apply Defendants' motion to dismiss to Plaintiffs' Amended Complaint. *See Nix v. Hoke,* 62 F. Supp. 2d 110, 115 (D.D.C. 1999) (citing cases); *see also* 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1476 (2d ed. 1990) ("[D]efendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending. If some of the defects raised

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contains three counts. First, Plaintiffs contend that Defendants' conduct denies the twelve Kuwaiti nationals due process in violation of the Fifth Amendment to the Constitution. *Id.* ¶ 37. Second, Plaintiffs argue that Defendants' actions violate the Alien Tort Claims Act, 28 U.S.C. § 1350. *Id.* ¶ 38. Lastly, Plaintiffs allege that Defendants' conduct constitutes arbitrary, unlawful, and unconstitutional behavior in violation of the Administrative Procedure Act, 5 U.S.C. §§ 555, 702, 706. *Id.* ¶ 39.

In the *Rasul* case, Respondents moved to dismiss the First Amended Petition for Writ of Habeas Corpus on March 18, 2002. This motion was fully briefed on April 29, 2002. On May 1, 2002, the *Odah* case was filed and Plaintiffs designated it as related to the *Rasul* matter. Thus, *Odah* was assigned to this Court. Plaintiffs in *Odah* moved for a preliminary injunction at the time they filed their suit. Instead of filing a memorandum in opposition to the motion for preliminary injunction, Defendants in the *Odah* case moved to dismiss the action. That motion was fully briefed on June 14, 2002.[4]

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in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading. To hold otherwise would be to exalt form over substance.").

[4] The Court's initial briefing schedule in the *Odah* case did not contemplate that Defendants would be moving to dismiss the entire action. Rather the Court's briefing schedule set forth a date for Defendants to respond to Plaintiffs' motion for preliminary injunction. *Odah v. United States,* Civ. No. 02-828 (D.D.C. May 14, 2002) (order setting forth briefing schedule). Instead of filing an opposition to the motion for a preliminary injunction, on the date that their opposition to the preliminary injunction was due, Defendants moved to dismiss the entire case (and, by inference, the motion for preliminary injunction). Plaintiffs filed a timely opposition to Defendant's motion. Defendants

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At the time the Court received the motion to dismiss in the *Odah* matter, it became obvious to the Court that the government was moving to dismiss both cases primarily on jurisdictional grounds. Accordingly, the Court found it appropriate to make a threshold ruling on the jurisdictional question in both cases before conducting any further proceedings. Mindful of the importance of these suits, which raise concerns about the actions of the Executive Branch, the Court heard oral argument on the government's motion to dismiss in both cases on June 26, 2002.

III. FACTUAL BACKGROUND[5]

A. ***Rasul v. Bush***

Little is known about Petitioner David Hicks except that he was allegedly living in Afghanistan at the time of his seizure by the United States Government. Am. Pet. ¶ 22. As for Petitioner Rasul, in the summer of 2001, he

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then filed a reply, which Plaintiffs argued was inappropriate since the Court's initial briefing schedule did not set a date for Defendants to file a reply. However, when the Court set the initial briefing schedule, it was only concerned with receiving a response to the motion for preliminary injunction. Defendants were clearly within their right to move for dismissal of the entire action, which would permit them the opportunity to file a reply to their motion to dismiss. Although Defendants filed their reply late, the Court shall grant them leave to file the reply. To the extent that Plaintiffs' opposition to Defendants' filing of a reply brief responds to new issues first raised in Defendants' reply, the Court shall consider Plaintiffs' response as a surreply to Defendants' motion to dismiss.

[5] For purposes of the instant motions to dismiss, the allegations of the Amended Petition/Amended Complaint are taken as true. The facts in this section are presented accordingly, and do not constitute factual findings by this Court.

allegedly took a hiatus from studying for his computer engineering degree to travel. *Id.* ¶ 24. Allegedly, Petitioner Rasul's brother convinced him to move to Pakistan "to visit relatives and explore his culture." *Id.* Petitioner Rasul left the United Kingdom after September 11, 2001, and allegedly traveled to Pakistan solely to attempt to continue his education at less expense than it would cost to take similar courses in the United Kingdom. *Id.* Petitioner Rasul allegedly stayed with an Aunt in Lahore, Pakistan before engaging in further travel within that country. *Id.* Allegedly, forces fighting against the United States captured and kidnapped Petitioner Rasul after he left Lahore. *Id.*

As for Petitioner Iqbal, it is alleged that in July of 2001, his family arranged for him to marry a woman living in the same village in Pakistan as Petitioner Iqbal's father. *Id.* ¶ 23. After September 11, 2001, Petitioner Iqbal left the United Kingdom and allegedly traveled to Pakistan solely for the purpose of getting married. *Id.* In early October of 2001, shortly before the marriage, Petitioner Iqbal's father allegedly allowed Petitioner Iqbal to leave the village briefly. *Id.* After leaving the village, forces working in opposition to the United States allegedly captured Petitioner Iqbal. *Id.*

Petitioners Rasul, Iqbal, and Hicks were picked up in a region of the world where the United States is actively engaged in military hostilities authorized by a Joint Resolution of the United States Congress, passed on September 18, 2001, in the wake of the September 11, 2001, terrorist attacks. The Joint Resolution authorizes the President to:

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001) (cited in Am. Pet. ¶ 25). In the course of the military campaign authorized by the Joint Resolution, the United States attacked the Taliban, the ruling government of Afghanistan. Am. Pet. ¶ 25. While seeking to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, "a loosely knit coalition of Afghani and other military groups opposed to the Taliban Government." *Id.* ¶ 26.

The Northern Alliance captured Petitioner David Hicks in Afghanistan and transferred custody of him to the United States on December 17, 2001. *Id.* ¶ 27. The precise circumstances surrounding Petitioner Rasul's and Petitioner Iqbal's capture are unknown. However, they appear to have been transferred to United States control in early December of 2001. *Id.* ¶ 28.

It is alleged in the Amended Petition that at no time did any of the Petitioners in United States custody voluntarily join any terrorist force. *Id.* ¶ 30.[6] Additionally, if any

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[6] While denying a role in any terrorist activity, Petitioners in their Amended Petition for Writ of Habeas Corpus conspicuously neglect to deny that they took up arms for the Taliban. In fact, in an exhibit attached to the Amended Petition, Petitioner Terry Hicks, who has

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of the Petitioners in United States custody "ever took up arms in the Afghani struggle, it was only on the approach of the enemy, when they spontaneously took up arms to resist the invading forces, without having had time to form themselves into regular armed units, and carrying their arms openly and respecting all laws and customs of war." *Id.* Additionally, it is alleged in the Amended Petition that if Petitioners Rasul, Iqbal, and David Hicks were in Afghanistan prior to being captured, "it was in order to facilitate humanitarian assistance to the Afghani people." *Id.* ¶ 31. Furthermore, these Petitioners allegedly "have taken no step that was not fully protected as their free exercise of their religious and personal beliefs." *Id.*

B. *Odah v. United States*

The twelve Kuwaiti nationals in the *Odah* case, who are in United States custody at the military base at Guantanamo Bay, were in Afghanistan and Pakistan, some before and some after, September 11, 2001. Am. Compl. ¶ 14. These individuals were allegedly in those countries as volunteers for charitable purposes to provide humanitarian aid to the people of those countries. *Id.* The government of Kuwait allegedly supports such volunteer

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brought this suit on behalf of his son, indicates that his son had joined the Taliban forces. Am. Pet., Ex. C., "Affidavit of Stephen James Kenny," Attach. 8 (Letter from Stephen Kenny, counsel for Petitioner Terry Hicks to Respondent Bush) ("It is our client's understanding that his son subsequently joined the Taliban forces and on 8 December 2001 was captured by members of the Northern Alliance."). Interestingly, this fact has been omitted from the text of the Amended Petition, but can be found only by a careful reading of an exhibit attached to the Amended Petition. *Id.*

service by continuing to pay the salaries of its Kuwaiti employees while they engage in this type of volunteer service abroad. *Id.*

According to the Amended Complaint, none of those held in United States custody are, or have ever been, a combatant or belligerent against the United States, or a supporter of the Taliban or any terrorist organization. *Id.* ¶ 15. Villagers seeking bounties or other promised financial rewards allegedly seized the twelve Kuwaiti Plaintiffs against their will in Afghanistan or Pakistan. *Id.* ¶ 16. Subsequently these twelve Plaintiffs were transferred into the custody of the United States. *Id.* At various points in time, beginning in January of 2002, these twelve Plaintiffs were transferred to Guantanamo Bay. *Id.* ¶¶ 19-21.[7]

IV. LEGAL STANDARD DISTRICT COURTS USE IN EVALUATING MOTIONS TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

In both matters before the Court, the government has moved to dismiss on jurisdictional grounds. Before a federal court can hear a case, it must ascertain that it has jurisdiction over the underlying subject matter of the action. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) ("Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.").

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[7] It has not been confirmed that Plaintiff Mohammed Funaitel Al Dihani is currently in custody at Guantanamo Bay. Am. Compl. ¶ 21.

Motions to dismiss for lack of jurisdiction over the subject matter of the action are proper under Federal Rule of Civil Procedure 12(b)(1). In the Rule 12(b)(1) context, the plaintiff bears the burden of proving jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936). In both matters, the government challenges the actual complaint (and/or petition) itself, without relying on matters outside the pleadings. *See generally Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987) (explaining that materials *aliunde* pleadings can be considered on a Rule 12(b)(1) motion). One commentator has referred to this type of motion as a "facial challenge" to a complaint, because a district court is not asked to review documents outside the pleadings. 2 James Wm. Moore et al., *Moore's Federal Practice*, § 12.30[4], at 39 (3rd ed. 2002) ("A facial attack questions the sufficiency of the pleading."). As both motions to dismiss before the Court present such "facial challenges," the Court must accept all of the Amended Petition's/Amended Complaint's well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in Petitioners'/Plaintiffs' favor. *United Transp. Union v. Gateway Western R.R.*, 78 F.3d 1208, 1210 (7th Cir. 1996) (*citing Rueth v. EPA*, 13 F.3d 227, 229 (7th Cir. 1993)).[8]

[8] Notably, there are a few attachments to the Amended Petition for Writ of Habeas Corpus which the Court cites in this Memorandum Opinion. The Court does not consider these matters to be outside the pleadings because they were attached as exhibits to the Amended Petition.

V. DISCUSSION

A. Alien Tort Statute and Administrative Procedure Act Claims

1. *Rasul v. Bush*

The Amended Petition for a Writ of Habeas Corpus in the *Rasul* action states that "Petitioners bring this action under 28 U.S.C. §§ 2241 and 2242, and invoke this Court's jurisdiction under 28 U.S.C. §§ 1331, 1350, 1651, 2201, and 2202, 5 U.S.C. § 702; as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the International Covenant on Civil and Political Rights ("ICCPR"), the American Declaration on the Rights and Duties of Man ("ADRDM"), and Customary International Law." Am. Pet. ¶ 2. While Petitioners seek to invoke this Court's jurisdiction under a host of separate provisions, the suit is *brought* explicitly as a petition for writs of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2242.

It has long been held that challenges to an individual's custody can only be brought under the habeas provisions. *See Chatman-Bey v. Thornburgh*, 864 F.2d 804, 807 (D.C. Cir. 1988) (*en banc*) ("Habeas is . . . 'a fundamental safeguard against unlawful custody.'") (quoting Justice Harlan's dissent in *Fay v. Noia*, 372 U.S. 391, 449 (1963)); *Monk v. Secretary of the Navy*, 793 F.2d 364, 366 (D.C. Cir. 1986) ("In adopting the federal habeas corpus statute, Congress determined that habeas corpus is the appropriate federal remedy for a prisoner who claims that he is 'in custody in violation of the Constitution . . . of the United States.'") (quoting 28 U.S.C. § 2241(c)(3)). As Petitioners seek to be "released from respondents' unlawful custody," the Court can consider this case only as a petition for writs of habeas

corpus and not as an action brought pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, or any of the other jurisdictional bases suggested in the Amended Petition. The exclusive means for securing the relief Petitioners seek is through a writ of habeas corpus.

2. ***Odah v. United States***

Seeking to avoid having the Court consider their case as a petition for writ of habeas corpus, Plaintiffs in *Odah* disclaim any desire to be released from confinement. Am. Compl. at 4. In fact, Plaintiffs have filed an Amended Complaint that eliminates an earlier request that this Court consider transferring the twelve Kuwaiti detainees to Kuwait. By eliminating this request, Plaintiffs endeavor to distance themselves from anything that might be construed as an effort to seek their release from United States custody. Instead, Plaintiffs in *Odah* ask this Court to enter a preliminary and permanent injunction prohibiting the government from refusing to allow the Kuwaiti nationals to "meet with their families," "be informed of the charges, if any, against them," "designate and consult with counsel of their choice," and "have access to the courts or some other impartial tribunal." Am. Compl. ¶ 40.

While purporting not to seek release from confinement, Plaintiffs in their Amended Complaint plainly challenge the lawfulness of their custody. The Supreme Court has held that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody." *Preiser v. Rodriguez,* 411 U.S. 475, 484 (1973). As the United States Court of Appeals for the District of Columbia Circuit stated in *Chatman-Bey,* "[a]s previously suggested, the modern habeas cases teach, broadly, that

habeas is designed to test the lawfulness of the government's asserted right to *detain* an individual." *Chatman-Bey,* 864 F.2d at 809 (emphasis in original); *see also Razzoli v. Federal Bureau of Prisons,* 230 F.3d 371, 373 (D.C. Cir. 2000) ("[W]e adhere to *Chatman-Bey*: for a federal prisoner, habeas is indeed exclusive even when a non-habeas claim would have a merely probabilistic impact on the duration of custody.").

In the present case, Plaintiffs' fourth request for relief squarely challenges the validity of Plaintiffs' detention. Plaintiffs seek to have "access to the courts or some other impartial tribunal." Am. Compl. ¶ 40. Elaborating on this request, Plaintiffs have told the Court that they seek access to an impartial tribunal in order to "expeditiously establish their innocence and be able to return to Kuwait and their families." Pls.' Mem. of P. & A. in Supp. of Mot. for a Prelim. Inj. ("Pls.' Mem.") at 2. Without question, this prayer for relief is nothing more than a frontal assault on their confinement. While Plaintiffs in this case state that they do not seek immediate release, neither did the plaintiffs in *Chatman-Bey* or *Monk*. Nevertheless, the District of Columbia Circuit in both of those cases found that the federal habeas statute was the only lawful way for the petitioners to challenge their confinement. *Chatman-Bey,* 864 F.2d at 809; *Monk,* 793 F.2d at 366. In the *Odah* case, Plaintiffs seek to be presented immediately before a court to exonerate themselves "expeditiously." This type of claim

is within the exclusive province of the writ of habeas corpus.[9]

The other provisions of Plaintiffs' request for relief, namely that they be permitted to "meet with their families," "be informed of the charges, if any, against them," and "designate and consult with counsel of their choice," Am. Compl. ¶ 40, are directly related to their request to be brought before a court which would determine the extent of their entitlement to rights. Plaintiffs cannot escape having the Court convert their action into writs for habeas corpus by adding these three additional requests for relief.

Plaintiffs argue that they merely seek to challenge the *conditions* of their confinement relying principally on *Gerstein v. Pugh,* 420 U.S. 103 (1975). Pls.' Opp'n to Defs.' Mot. to Dismiss Pls.' Compl. and Mot. for a Prelim. Inj. ("Pls.' Opp'n") at 19-20. The Supreme Court in *Gerstein* found that, pursuant to 42 U.S.C. § 1983, a declaratory judgment action against state officials was a permissible means to address whether a person arrested and held for trial under a prosecutor's information was constitutionally entitled to a probable cause hearing before a judge. *Gerstein,* 420 U.S. at 107 n.5. Thus, the Supreme Court concluded that such an action did not need to be filed as a habeas petition. *Id.* at n.6 ("Respondents did not ask for release from state custody, even as an alternative remedy.

[9] Plaintiffs cite to the habeas statutes as a basis for the Court's jurisdiction over their claims. Am. Compl. ¶ 1. Even though Plaintiffs have disavowed that their action is one sounding in habeas, the *Amended* Complaint continues to rely on the habeas statutes to provide this Court with jurisdiction.

They asked only that the state authorities be ordered to give them a probable cause determination.").

There are clear differences between the claims presented in *Odah* and those addressed by the Court in *Gerstein.* As the Third Circuit has noted, "[I]n *Gerstein v. Pugh,* the constitutional validity of a method of pretrial procedure, *rather than its application to any particular case, was the focus of the challenge.*" *Tedford v. Hepting,* 990 F.2d 745, 749 (3d Cir. 1993) (emphasis added). The *Gerstein* Court recognized that the pretrial custody of the named plaintiffs had long since expired. *Gerstein,* 420 U.S. at 110 n.11. Accordingly, the claims the *Gerstein* Court addressed were focused on the constitutional adequacy of a pretrial procedure as it existed in the abstract. Plaintiffs in *Odah,* on the other hand, each seek a hearing on the merits of their individualized detentions.

In addition, Plaintiffs have not brought a declaratory judgment action seeking to invalidate some procedure that would not impact the duration of their confinement. The issue in *Odah* is Plaintiffs' desire to have a hearing before a neutral tribunal. For such a claim, a petition for writ of a habeas corpus is the exclusive avenue for relief.[10] Thus, as

[10] Plaintiffs' citation to *Brown v. Plaut* is similarly unavailing. Pls.' Opp'n at 20 (citing *Brown v. Plaut,* 131 F.3d 163 (D.C. Cir. 1997)). The *Brown* case involved a prisoner's challenge to a decision to place him in administrative segregation. The Court of Appeals held that such action did not have to be brought as a petition for writ of habeas corpus. *Id.* at 167. In that case, the appellate panel observed that the Supreme Court "has never deviated from *Preiser*'s clear line between challenges to the fact or length of custody and challenges to the conditions of confinement." *Id.* at 168. Plaintiffs' broad request to be produced before a tribunal is obviously a challenge "to the fact . . . of custody." *Id.* Accordingly, *Brown* does not apply to this case.

it does in *Rasul,* the Court shall review the jurisdictional basis of the *Odah* case as if it were styled as a petition for writ of habeas corpus.[11]

[11] Alternatively, the Court notes that in order for the government to be sued under the Alien Tort Statute, the government must waive its sovereign immunity. *FDIC v. Meyer,* 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). Plaintiffs argue that Section 702 of the Administrative Procedure Act provides such a waiver. Pls.' Opp'n at 24 (citing *Sanchez-Espinoza v. Reagan,* 770 F.2d 202, 207 (D.C. Cir. 1985) (Scalia, J.) (stating that while the Alien Tort Statute does not provide a waiver of sovereign immunity, "[w]ith respect to claims against federal [officials] for *nonmonetary* relief . . . the waiver of the Administrative Procedure Act . . . is arguably available") (emphasis in original)).

Assuming that Section 702 of the Administrative Procedure Act provides a waiver, the Court finds that the actions of the government in this case would be exempt by 5 U.S.C. § 701(b)(1)(G) (providing an exemption for, "military authority exercised in the field in time of war or in occupied territory"). Cases that have analyzed Section 701(b)(1)(G) have had occasion to address it only in the context of "judicial interference with the relationship between soldiers and their military superiors." *Doe v. Sullivan,* 938 F.2d 1370, 1380 (D.C. Cir. 1991). Despite the absence of pertinent case law, the language of Section 701(b)(1)(G) supports the view that this Court is unable to review the claim Plaintiffs make under the Administrative Procedure Act. There is no dispute that Plaintiffs were captured in areas where the United States was (and is) engaged in military hostilities pursuant to the Joint Resolution of Congress. Am. Compl. ¶ 16 ("the Kuwaiti Detainees were seized against their will in Afghanistan or Pakistan"). This situation plainly falls within Section 701(b)(1)(G).

The Court was unable to find any material in the legislative history that addressed Section 701(b)(1)(G) of the Administrative Procedure Act, *see, e.g.,* S. Rep. No. 89-1350, at 32-33 (1966); H.R. Rep. No. 89-901, at 16 (1965), and the parties have not provided any legislative history, that would change the Court's view of this provision. Furthermore, granting Plaintiffs relief under the Administrative Procedure Act would produce a bizarre anomaly: United States soldiers would be unable to use the courts of the United States to sue about events arising on the battlefield, while aliens, with no connection to the United States, could

(Continued on following page)

B. The Ability of Courts to Entertain Petitions for Writs of Habeas Corpus Made By Aliens Held Outside the Sovereign Territory of the United States

The Court, therefore, considers both cases as petitions for writs of habeas corpus on behalf of aliens detained by the United States at the military base at Guantanamo Bay, Cuba. In viewing both cases from this perspective, the Court concludes that the Supreme Court's ruling in *Johnson v. Eisentrager,* 339 U.S. 763 (1950), and its progeny, are controlling and bars the Court's consideration of the merits of these two cases. The Court shall briefly provide an overview of the *Eisentrager* decision, discuss the distinction in *Eisentrager* between the rights of citizens and aliens, analyze whether *Eisentrager* applies only to enemy aliens, and lastly, discuss the meaning of the concept of "sovereign territory" as presented in *Eisentrager.*

1. *Johnson v. Eisentrager*

The *Eisentrager* case involved a petition for writs of habeas corpus filed by twenty-one German nationals in

sue their United States military captors while hostilities continued. Such an outcome defies common sense.

Accordingly, even if the Court did not treat the *Odah* case as a petition for writs of habeas corpus, Count III, brought pursuant to the Administrative Procedure Act, fails because the actions complained of by Plaintiffs are exempt pursuant to 5 U.S.C. § 701(b)(1)(G). Additionally, as Plaintiffs have not set forth another basis for the government's waiver of its sovereign immunity outside the Administrative Procedure Act, Count II brought pursuant to the Alien Tort Statute would be subject to dismissal.

the United States District Court for the District of Columbia. *Eisentrager,* 339 U.S. at 765. The prisoners in *Eisentrager* had been captured in China for engaging in espionage against the United States following the surrender of Germany, but before the surrender of Japan, at the end of World War II. *Id.* at 766. Since the United States was at peace with Germany, the actions of the *Eisentrager* petitioners violated the laws of war. *Id.* Following a trial and conviction by a United States military commission sitting in China, with the express permission of the Chinese government, the prisoners were repatriated to Germany to serve their sentences at Landsberg Prison. *Id.* Their immediate custodian at Landsberg Prison was a United States Army officer under the Commanding General, Third United States Army, and the Commanding General, European Command. *Id.*

The district court dismissed the petition for want of jurisdiction. *Id.* at 767. An appellate panel reversed the decision of the district court and remanded the case for further proceedings. *See Eisentrager v. Forrestal,* 174 F.2d 961 (D.C. Cir. 1949). In an opinion by Judge E. Barrett Prettyman, the Court of Appeals for the District of Columbia Circuit held that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *Id.* at 963.

A divided panel of the Supreme Court reversed the decision of the District of Columbia Circuit and affirmed the judgment of the district court. *Eisentrager,* 339 U.S. at 791. In finding that *no* court had jurisdiction to entertain the claims of the German nationals, the Supreme Court, in an opinion by Justice Robert Jackson, found that a court

was unable to extend the writ of habeas corpus to aliens held outside the sovereign territory of the United States. *Id.* at 778.

2. The Critical Distinction Between Citizens and Aliens

Justice Jackson began his opinion by noting the legal differences between citizens and aliens, and between friendly aliens and enemy aliens. *Id.* at 769. Noting that citizenship provides its own basis for jurisdiction, Justice Jackson observed that "[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar." *Id.* Such protections, Justice Jackson noted, also apply to an individual seeking a fair hearing on his or her claim to citizenship. *Id.* 769-70 (citing *Chin Yow v. United States,* 208 U.S. 8 (1908)).

In the case of the alien, Justice Jackson wrote that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Id.* at 770. For example, presence within the country provides an alien with certain rights that expand and become more secure as he or she declares an intent to become a citizen, culminating in the full panoply of rights afforded to the citizen upon the alien's naturalization. *Id.* In extending constitutional protections beyond the citizenry, Justice Jackson noted that the Supreme Court "has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.* at 771.

Justice Jackson's sentiment is borne out by the case law. Courts of the United States have exercised jurisdiction in

cases involving individuals seeking to prove their citizenship, *Chin Yow,* 208 U.S. at 13 (1908) (habeas action permitted for one seeking admission to the country to assure a hearing on his claims to citizenship), or in situations where aliens held in a port of the United States sought entry into the country, *Nishimura Ekiu v. United States,* 142 U.S. 651, 660 (1892) ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful."). In the cases at bar it is undisputed that the individuals held at Guantanamo Bay do not seek to become citizens. Nor have Petitioners or Plaintiffs suggested that they have ever been to the United States or have any desire to enter the country. Petitioners and Plaintiffs do not fall into any of the categories of cases where the courts have entertained the claims of individuals seeking access to the country.

3. Does the *Eisentrager* Opinion Apply Only to "Enemy" Aliens?

Justice Jackson continued his analysis in *Eisentrager* by noting that enemy aliens captured incident to war do not have even a qualified access to the courts of the United States as compared to an alien who has lawful residence within the United States. *Eisentrager,* 339 U.S. at 776 ("[T]he nonresident enemy alien, especially one who has remained in the service of the enemy, does not have . . . this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy."); *id.* (quoting *Clarke v. Morey,* 10 Johns. 69, 72 (N.Y. Sup. Ct. 1813) ("A

lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.")). Petitioners in *Rasul* and Plaintiffs in *Odah* argue that the determination by the military commission in China that the petitioners in *Eisentrager* were enemy aliens is fatal to the government's reliance on *Eisentrager.* Pet'rs Mem. in Opp'n to Resp'ts Mot. to Dismiss ("Pet'rs Opp'n") at 12; Pls.' Opp'n at 6-7. Insisting that no determination has been made about the aliens presently held by the government at Guantanamo Bay, Plaintiffs and Petitioners argue that the holding in *Eisentrager* is inapplicable to the instant cases.

To the contrary, the Supreme Court's conclusion in *Eisentrager,* that the district court was without jurisdiction to consider the petition for writs of habeas corpus on behalf of the twenty-one German nationals, did not hinge on the fact that the petitioners were enemy aliens, but on the fact that they were aliens outside territory over which the United States was sovereign. The Supreme Court held:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the sences of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.

Id. at 777-78. In fact, the Supreme Court has consistently taken the position that *Eisentrager* does not apply only to

those aliens deemed to be "enemies" by a competent tribunal. *See Zadvydas v. Davis,* 533 U.S. 678, 693 (2001) (Breyer, J.); *United States v. Verdugo-Urquidez,* 494 U.S. 259, 270 (1990) (Rehnquist, C.J.). These later Supreme Court cases reinforce the conclusion that there is no meaningful distinction between the cases at bar and the *Eisentrager* decision on the mere basis that the petitioners in *Eisentrager* had been found by a military commission to be "enemy" aliens.[12]

In *Zadvydas,* the Court cited *Eisentrager* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas,* 533 U.S. at 693 (discussing also that "once an

[12] The government has encouraged this Court to take "judicial notice" that these individuals are "enemy combatants." Tr. 9-10. In reviewing this case, the Court has taken the allegations in the Amended Petition and Amended Complaint as true as required by Rule 12(b)(1). Petitioners and Plaintiffs allege that the individuals held at Guantanamo Bay were initially taken into custody and detained in Afghanistan and Pakistan where military hostilities were in progress. Am. Pet. ¶¶ 22-24; Am. Compl. ¶ 16. David Hicks, who had joined the Taliban, *see supra* note 6, arguably may be appropriately considered an "enemy combatant." The paucity, ambiguity, and contradictory information provided by the Amended Petition and the Amended Complaint about Petitioners Rasul and Iqbal and the twelve Kuwaiti Plaintiffs held at the military base at Guantanamo Bay prevents the Court from likewise concluding that these individuals were engaged in hostilities against the United States, or were instead participating in the benign activities suggested in the pleadings. While another court with apparently the same factual record has labeled, without explanation, the individuals held at Guantanamo Bay "enemy combatants," *Coalition of Clergy v. Bush,* 189 F. Supp. 2d, 1036, 1048 (C.D. Cal. 2002), this Court on the record before it, declines to take that step because taking judicial notice of a fact requires that the fact be "not subject to reasonable dispute." Fed. R. Evid. 201.

alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). In *Verdugo-Urquidez,* the Court quoted a passage from *Eisentrager* for the proposition that the Supreme Court has emphatically rejected "extraterritorial application of the Fifth Amendment." *Verdugo-Urquidez,* 494 U.S. at 269. The Court of Appeals for the District of Columbia Circuit has taken a similarly broad view of *Eisentrager. Harbury v. Deutch,* 233 F.3d 596, 605 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury,* 122 S. Ct. 2179 (2002) (observing that the Supreme Court's citation to *Eisentrager* in *Verdugo-Urquidez* was binding, and expressing its view that extraterritorial application of the Fifth Amendment was not available for aliens).

If there exists any doubt as to the sweeping nature of the holding in *Eisentrager,* the dissent in that opinion clearly crystalizes the extent of the decision. Justice Douglas, writing for himself and two other Justices, stated:

> If the [majority's] opinion thus means, and it apparently does, that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle. . . . [T]he Court's opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared.

Eisentrager, 339 U.S. at 795-96 (Douglas, J., dissenting). Thus, even Justice Douglas noted that according to the

majority's opinion in *Eisentrager*, the Great Writ had no extraterritorial application to aliens.

Accordingly, the Court finds that *Eisentrager* is applicable to the aliens in these cases, who are held at Guantanamo Bay, even in the absence of a determination by a military commission that they are "enemies."[13] While it is true that the petitioners in *Eisentrager* had already been convicted by a military commission, *id.* at 766, the *Eisentrager* Court did not base its decision on that distinction. Rather, *Eisentrager* broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus.

In sum, the *Eisentrager* decision establishes a two-dimensional paradigm for determining the rights of an individual under the habeas laws. If an individual is a citizen or falls within a narrow class of individuals who are akin to citizens, i.e. those persons seeking to prove their citizenship and those aliens detained at the nation's ports, courts have focused on status and have not been as concerned with the situs of the individual. However, if the individual is an alien without any connection to the United States, courts have generally focused on the location of the alien seeking to invoke the jurisdiction of

[13] The United States confronts an untraditional war that presents unique challenges in identifying a nebulous enemy. In earlier times when the United States was at war, discerning "the enemy" was far easier than today. "[I]n war 'every individual of the one nation must acknowledge every individual of the other nation as his own enemy.'" *Eisentrager* 339 U.S. at 772 (quoting *The Rapid*, 8 Cranch 155, 161 (1814)). The two cases at bar contain nationals from three friendly countries at peace with the United States, demonstrating the difficulty in determining who is the "enemy."

the courts of the United States. If an alien is outside the country's sovereign territory, then courts have generally concluded that the alien is not permitted access to the courts of the United States to enforce the Constitution. Given that *Eisentrager* applies to the aliens presently detained at the military base at Guantanamo Bay, the only question remaining for the Court's resolution is whether Guantanamo Bay, Cuba is part of the sovereign territory of the United States.

4. Is Guantanamo Bay Part of the Sovereign Territory of the United States?

The Court in *Eisentrager* discusses the territory of the United States in terms of sovereignty. *Id.* at 778 ("for these prisoners at no relevant time were within any territory over which the United States is sovereign"). It is undisputed, even by the parties, that Guantanamo Bay is not part of the sovereign territory of the United States.[14] Thus,

[14] The United States occupies Guantanamo Bay under a lease entered into with the Cuban government in 1903. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418. The lease provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [the military base at Guantanamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

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the only question remaining for resolution is whether this fact alone is an absolute bar to these suits, or whether aliens on a United States military base situated in a foreign country are considered to be within the territorial jurisdiction of the United States, under a *de facto* theory of sovereignty.

Petitioners and Plaintiffs assert that the United States has *de facto* sovereignty over the military base at Guantanamo Bay, and that this provides the Court with the basis needed to assert jurisdiction. Pet'rs Opp'n at 21; Pls.' Opp'n at 11. In other words, Petitioners and Plaintiffs argue that even if the United States does not have *de jure* sovereignty over the military facility at Guantanamo Bay, it maintains *de facto* sovereignty due to the unique nature of the control and jurisdiction the United States exercises over this military base. According to Petitioners and Plaintiffs, if the United States has *de facto* sovereignty over the military facility at Guantanamo Bay, then *Eisentrager* is inapplicable to their cases and the Court is able to assume jurisdiction over their claims. However, the cases relied on by Petitioners and Plaintiffs to support their thesis are belied not only by *Eisentrager,* which never qualified its definition of sovereignty in such a manner, but also by the very case law relied on by Petitioners and Plaintiffs.

At oral argument, when asked for a case that supported the view that *de facto* sovereignty would suffice to provide the Court with jurisdiction, both Petitioners and

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Id. As is clear from this agreement, the United States does not have sovereignty over the military base at Guantanamo Bay.

Plaintiffs directed the Court to *Ralpho v. Bell,* 569 F.2d 607 (D.C. Cir. 1977). Tr. at 33, 62-63. The *Ralpho* case involves a claim brought under the Micronesian Claims Act of 1971, which was enacted by the United States Congress to establish a fund to compensate Micronesians for losses incurred during the hostilities of World War II. *Ralpho,* 569 F.2d at 611. The plaintiff in that case, a citizen of Micronesia, argued that the Micronesian Claims Commission, established by the Act to adjudicate settlement claims, violated his due process rights by relying on secret evidence in deciding his claim. *Id.* at 615. While the United States did not have sovereignty over Micronesia, the District of Columbia Circuit found that the plaintiff was entitled to the protections of the due process clause. *Id.* at 618-19.

Petitioners and Plaintiffs have seized upon this case as an example of a court granting an alien due process rights in a geographic area where the United States was not sovereign. Petitioners and Plaintiffs contend that if the plaintiff in *Ralpho* was able to secure constitutional rights in an area where the United States was not sovereign, constitutional rights are arguably available to aliens located in places where the United States is the *de facto* sovereign. The problem for Petitioners and Plaintiffs is that *Ralpho* does not stand for the proposition that a court can grant constitutional rights over a geographical area where *de facto* sovereignty is present. Rather, *Ralpho* stands for a limited extension of the uncontested proposition that aliens residing in the sovereign territories of the United States are entitled to certain basic constitutional rights.

As the Court of Appeals explained in *Ralpho,* "[t]hat the United States is answerable to the United Nations for

its treatment of the Micronesians does not give Congress greater leeway to disregard the fundamental rights and liberties of a people as much American subjects as those in other American territories." *Id.* After this observation, the *Ralpho* Court quoted the remarks of the United States Representative to the United Nations Security Council Meeting that considered whether to award trusteeship to the United States: "My government feels that it has a duty toward the peoples of the Trust Territory to govern them with no less consideration than it would govern any part of its sovereign territory." *Id.* n.72 (internal citation omitted). Additionally, when the United States was appointed by the United Nations to administer Micronesia as a trust territory, no other nation had sovereignty over Micronesia, and the United States had "full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of [the trust] agreement." Trusteeship Agreement for the Former Japanese Mandated Islands Approved at the One Hundred and Twenty-Fourth Meeting of the Security Council, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, art. 3; *id.*, preamble (noting that "Japan, as a result of the Second World War, has ceased to exercise any authority in these islands").

As clearly set forth in the case, the *Ralpho* Court treated Micronesia as the equivalent of a United States territory, such as Puerto Rico or Guam. In fact, *Ralpho* relies solely on the cases establishing constitutional rights for persons living in the territories of the United States as support for the view that the plaintiff located in Micronesia was deserving of certain due process rights. *Ralpho,* 569 F.2d at 619 n.70 (citing, *inter alia, Balzac v. Porto Rico,* 258 U.S. 298, 313 (1922)). The *Balzac* case, which predates *Eisentrager,* stands for the proposition that the

limits of due process apply to the sovereign territories of the United States. *Balzac,* 258 U.S. at 313; *id* at 312 ("The Constitution, however, contains grants of power, and limitations which in the nature of things are not always and everywhere applicable and the real issue in the Insular Cases was not whether the Constitution extended to the Philippines or [Puerto] Rico when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.").[15]

[15] In *Harbury,* the Court of Appeals referred to *Balzac* as a situation where foreign nationals were under "de facto U.S. political control." *Harbury,* 233 F.3d at 603. This phrase does not imply that in situations where "*de facto* sovereignty" might arguably be present, constitutional rights are available to aliens. In making this statement, the Court of Appeals cited to two cases involving Puerto Rico, *Examining Bd. of Eng'rs., Architects & Surveyors v. Otero,* 426 U.S. 572, 599 n.30 (1976) and *Balzac,* 258 U.S. at 312-13, and another case involving a special court of the United States that was held in Berlin, *United States v. Tiede,* 86 F.R.D. 227, 242-44 (U.S. Ct. Berlin 1979). In the two cases involving Puerto Rico, it is undisputed that the United States had sovereignty over the territory. In the case involving the special court convened in Berlin, the court was a United States court convened in an occupation zone controlled by the United States. *Tiede,* 86 F.R.D. at 244-45 ("The sole but novel question before the Court is whether friendly aliens, charged with civil offenses in a United States court in Berlin, under the unique circumstances of the continuing United States occupation of Berlin, have a right to a jury trial."). Accordingly, the fact that the panel in *Harbury* used the phrase "de facto U.S. political control" to describe a category of cases where constitutional rights were provided to non-citizens does not aid Petitioners and Plaintiffs. The cases relied upon by the Court of Appeals in *Harbury* for this statement do not support the view that where the United States has *de facto* sovereignty, courts of the United States have jurisdiction to entertain the claims of aliens.

Thus, the Court in *Ralpho* analogized the situation before it to those cases granting constitutional rights to the peoples of United States territories, even though the trust agreement with the United Nations did not provide for sovereignty over Micronesia. *Ralpho,* 569 F.2d at 619 n.71. The cases involving the territories of the United States, relied on by the *Ralpho* Court, are fundamentally different from the two cases presently before the Court. The military base at Guantanamo Bay, Cuba, is nothing remotely akin to a territory of the United States, where the United States provides certain rights to the inhabitants. Rather, the United States merely leases an area of land for use as a naval base. Accordingly, the Court is hard-pressed to adopt Petitioners' and Plaintiffs' view that the holding in *Ralpho* favors their claims.

In fact, another district court considering whether a *de facto* sovereignty test should be used to analyze claims occurring at the military base at Guantanamo Bay flatly rejected the idea. *Bird v. United States,* 923 F. Supp. 338 (D. Conn. 1996). In *Bird,* a plaintiff alleged a misdiagnosis of a brain tumor at the United States Medical Facility at Guantanamo Bay. *Id.* at 339. Seeking to sue under the Federal Tort Claims Act ("FTCA"), the plaintiff sought to distinguish prior case law which held that injuries occurring on leased military bases were exempt from the FTCA under the "foreign country" exemption. In order to circumvent this case law, the plaintiff in *Bird* argued that the unique territorial status of the military base at Guantanamo Bay brought injuries occurring on its soil within the FTCA. *Id.* at 340. Rejecting the plaintiff's argument that the United States had *de facto* sovereignty over the military base at Guantanamo Bay, the court wrote, "[b]ecause the 1903 Lease of Lands Agreement clearly

establishes Cuba as the *de jure* sovereign over Guantanamo Bay, this Court need not speculate whether the United States is the *de facto* sovereign over the area." *Id.* at 343. While *Bird* dealt with the foreign country exemption to the FTCA, it expressly disavowed a *de facto* sovereignty test, when it was clear that Cuba was the *de jure* sovereign over Guantanamo Bay.

The *Bird* case is not the only court to reject a *de facto* sovereignty test for claims involving aliens located at the military base at Guantanamo Bay. *Cuban American Bar Ass'n, Inc. v. Christopher,* 43 F.3d 1412 (11th Cir. 1995), *cert. denied,* 515 U.S. 1142 (1995). The *Cuban American Bar Association* case involved Cuban and Haitian migrants held in "safe haven" at Guantanamo Bay after they left their respective countries and were intercepted in international waters by the United States Coast Guard. *Id.* at 1417, 1419. The Eleventh Circuit specifically addressed the question of whether migrants "outside the physical borders of the United States have any cognizable statutory or constitutional rights." *Id.* at 1421. In *Cuban American Bar Association,* the Eleventh Circuit held:

> The district court here erred in concluding that Guantanamo Bay was a "United States territory." We disagree that "control and jurisdiction" [as set forth in the lease between the United States and Cuba] is equivalent to sovereignty. . . . [W]e again reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are "functional[ly] equivalent" to being land borders or ports of entry of the United States or otherwise within the United States.

Id. at 1425 (internal citations omitted). Thus, *Cuban American Bar Association* stands for the proposition that the military base at Guantanamo Bay is not within the territorial jurisdiction of the United States simply because the United States exercises jurisdiction and control over that facility.

Plaintiffs seek to distinguish *Cuban American Bar Association* by citing a Second Circuit opinion that has been vacated as moot by the Supreme Court. Pls.' Opp'n at 12-13 (citing *Haitian Centers Council, Inc. v. McNary,* 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Centers Council, Inc.,* 509 U.S. 918 (1993) [hereinafter "*HCC*"]). Ordinarily the Court would give short shrift to a case that has been vacated by the Supreme Court and not issued by the District of Columbia Circuit. However, since Plaintiffs in their papers, emphasize the importance of the reasoning in this vacated decision, the Court considers it necessary to briefly address the case.

The Court determines that *HCC* is distinguishable on its facts. In *HCC,* migrants were housed at the military base on Guantanamo Bay and determinations were made by Immigration and Naturalization Service ("INS") officers regarding their status. *Id.* at 1332-33. Those migrants that an INS officer deemed to have a credible fear of political persecution were "screened in" and were to be brought to the United States to pursue asylum claims. Those who did not fit within this class were repatriated to Haiti. *Id.*

The crucial distinction in their rights as aliens is that the aliens in *HCC* had been given some form of process by the government of the United States. Once the United States made determinations that the migrants had a credible fear of political persecution and could claim

asylum in the United States, these migrants became vested with a liberty interest that the government was unable to simply deny without due process of law. The situation in *HCC* is fundamentally different from the cases presently before the Court. The individuals held at Guantanamo Bay have no desire to enter the United States and no final decision as to their status has been made. At this stage of their detention, those held at Guantanamo Bay more closely approximate the migrants in *Cuban American Bar Association* than the migrants "screened in" for admission to the United States in *HCC.*[16]

VI. CONCLUSION

The Court concludes that the military base at Guantanamo Bay, Cuba is outside the sovereign territory of the United States. Given that under *Eisentrager,* writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States, this Court does not have jurisdiction to entertain the claims made by Petitioners in *Rasul* or Plaintiffs in *Odah.* Of course, just as the *Eisentrager* Court did not hold "that these prisoners have no right which the military authorities are bound to respect," *Eisentrager,* 339 U.S. at 789 n.14, this opinion, too, should not be read as stating that these aliens do not have some form of rights under international law. Rather,

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[16] While there is dicta in the *HCC* opinion which indicates a broader holding with regard to the constitutional rights of individuals detained at the military base on Guantanamo Bay, such dicta in *HCC* is not persuasive and not binding. *HCC,* 969 F.2d at 1343. The Supreme Court in *Eisentrager, Verdugo-Urquidez,* and *Zadvydas,* and the District of Columbia Circuit in *Harbury,* have all held that there is no extraterritorial application of the Fifth Amendment to aliens.

the Court's decision solely involves whether it has jurisdiction to consider the constitutional claims that are presented to the Court for resolution.

Petitioners and Plaintiffs argue that as long as the United States has *de facto* sovereignty over Guantanamo Bay, Fifth Amendment protections should apply. For this proposition, Petitioners and Plaintiffs rely on *Ralpho,* a case that involves land so similar to United States territory that the District of Columbia Circuit extended constitutional protections to its inhabitants. Clearly, Guantanamo Bay does not fall into that category. The Court, therefore, rejects the holding in *Ralpho* as a basis for this Court to exercise jurisdiction over the claims made by Petitioners and Plaintiffs. Accordingly, both cases shall be dismissed for want of jurisdiction.

/s/ Colleen Kollar-Kotelly
Colleen Kollar-Kotelly
United States District Judge

Copies to:

L. Barrett Boss
Suite 200
ASBILL, JUNKIN, MOFFITT & BOSS, CHARTERED
1615 New Hampshire Avenue, N.W.
Washington, DC 20009

Thomas B. Wilner
Neil H. Koslowe
Kristine A. Huskey
Heather L. Kafele
SHEARMAN & STERLING
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Robert D. Okun, AUSA
UNITED STATES ATTORNEY'S OFFICE
FOR THE DISTRICT OF COLUMBIA
555 4th Street, N.W.
Washington, D.C. 20001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL, SKINA BIBI, as Next Friend of Shafiq Rasul, *et al.*,

Petitioners,

v.

GEORGE WALKER BUSH, President of the United States, *et al.*,

Respondents.

Civil Action No. 02-299 (CKK)

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Civil Action No. 02-828 (CKK)

ORDER

(Filed July 30, 2002)

For the reasons stated in the accompanying Memorandum Opinion, it is this 30 day of July, 2002, hereby

ORDERED that Respondents' Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus [#26] filed in *Rasul v. Bush*, Civil Action No. 02-299, is GRANTED; it is further

ORDERED that Defendants' Motion to Dismiss Plaintiffs' Complaint and Plaintiffs' Motion for a Preliminary Injunction [#15] filed in *Odah v. United States*, Civil Action No. 02-828, is GRANTED; it is further

ORDERED that *Rasul v. Bush*, 02cv299, and *Odah v. United States*, 02cv828, are DISMISSED WITH PREJUDICE.

SO ORDERED.

/s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

Copies to:

L. Barrett Boss
Suite 200
ASBILL, JUNKIN, MOFFITT & BOSS, CHARTERED
1615 New Hampshire Avenue, N.W.
Washington, DC 20009

Thomas B. Wilner
Neil H. Koslowe
Kristine A. Huskey
Heather L. Kafele
SHEARMAN & STERLING
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Robert D. Okun, AUSA
UNITED STATES ATTORNEY'S OFFICE
FOR THE DISTRICT OF COLUMBIA
555 4th Street N.W.
Washington, D.C. 20001

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5251 **September Term, 2002**
02cv00299
02cv00828
02cv01130

Khaled A. F. Al Odah, Next
Friend of Fawzi Khalid
Abdullah Fahad Al Odah,et al.,

Appellants

v.

United States of America, et al.,

Appellees **Filed On:** Jun. 2, 2003

Consolidated with 02-5284, 02-5288

BEFORE: Randolph and Garland, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing in No. 02-5251, filed April 25, 2003, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5251 **September Term, 2002**
02cv00299
02cv00828
02cv01130

Khaled A. F. Al Odah, Next
Friend of Fawzi Khalid Abdul-
lah Fahad Al Odah, et al.,

Appellants

v.

United States of America, et al.,

Appellees **Filed On:** Jun. 2, 2003

Consolidated with 02-5284, 02-5288

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing en banc in No. 02-5251, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code
Title 5
Government Organization and Employees,
The Administrative Procedure Act

5 U.S.C. § 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory

proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 385.)

---

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the

United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

---

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

***Army Regulation 190-8**
***OPNAVINST 3461.6**
***AFJI 31-304**
***MCO 3461.1**

Effective 1 November 1997

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

* * *

1-5. General protection policy

* * *

a. (2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

* * *

1-6. Tribunals

* * *

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

* * *

g. Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

* * *

3-8. Judicial proceedings

* * *

d. Accused persons will be notified promptly of the charges in writing. Charges will be in a language understood by the accused. Those persons will be tried as soon as possible. A notification (in duplicate) of proceedings against a detainee will be submitted through channels to the NPWIC. The NPWIC will send such notification to the Protecting Power in cases of charges involving the death penalty or imprisonment for 2 years or more. Upon request, the Protecting Power will be furnished data on the status of such proceedings. Furthermore, the Protecting Power will be entitled, upon request, to be furnished with all data or any other proceedings started against a detainee. The information will be sent without delay. Trial will not commence until 3 weeks after the Protecting Power has been notified. Unless evidence is submitted at the opening of the trial that this regulation has been fully complied with, the trial will not proceed. The following information will be provided:

(1) Surname and first name, grade, if proper, ISN, date of birth, and profession, trade, or prior civil capacity of the detainee.

(2) Place of internment or confinement.

(3) Specification of the charges with penal provisions under which they are brought.

(4) Designation of the court that will hear the case.

* * *

***FM 3-19.40 (FM 19.40)**

Field Manual
No. 3-19.40

Headquarters
Department of the Army
Washington, DC, 1 August 2001

Military Police
Internment/Resettlement Operations

* * *

OTHER DETAINEE

1-10. A person in the custody of US armed forces who has not been classified as an EPW (Article 4, GPW), an RP (Article 33, GPW), or a CI (Article 78, GC) is treated as an EPW until a legal status is ascertained by competent authority.

* * *

TRIBUNAL

4-33. A tribunal is held according to Article 5, GPW. It determines the status of an individual who does not appear to be entitled to EPW status but –

- Commits a belligerent act to aid enemy armed forces.
- Engages in a hostile activity to aid enemy armed forces.
- Asserts that he or she is entitled to treatment as an EPW.

* * *

Geneva Convention Relative to the Treatment of Prisoners of War

Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949

***entry into force* 21 October 1950**

PART I

GENERAL PROVISIONS

* * *

Article 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

***entry into force* 23 March 1976, in accordance with Article 49**

* * *

PART III

* * *

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX

Adopted by the Ninth International Conference of American States (1948)

* * *

Article XXV.

Right of protection from arbitrary arrest. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

American Convention On Human Rights
O.A.S. T.S. NO. 36 (1969)

* * *

Part I – State Obligations And Rights Protected

Chapter II – Civil And Political Rights

Article 7. Right to Personal Liberty

* * *

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

General Assembly
A/RES/43/173
76th plenary meeting
9 December 1988

The General Assembly,

* * *

Convinced that the adoption of the draft Body of Principles would make an important contribution to the protection of human rights,

Considering the need to ensure the wide dissemination of the text of the Body of Principles,

1. Approves the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the text of which is annexed to the present resolution;

* * *

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Leaflet Distributed by U.S. Forces in Afghanistan

Available at www.psywarrior.com/Herbafghan.html

Coded TF-11-RP09

FRONT

Get wealth and power beyond your dreams. Help the Anti-Taliban Force rid Afghanistan of murders and terrorists.

BACK

You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people.

The New York Times

March 16, 2002, Saturday

FOREIGN DESK

A NATION CHALLENGED: CAPTIVES; An Uneasy Routine at Cuba Prison Camp

By KATHARINE Q. SEELYE (NYT) 1109 words

U.S. NAVAL AIR STATION, Guantánamo Bay, Cuba, March 15 – An elaborate social system is evolving here between American military guards and their captives from the Afghan war.

The system, controlled by the guards and tested repeatedly by the inmates, is largely based on privileges – given mainly so they can be taken away as a way to maintain discipline and encourage cooperation.

The little extras here at this sweltering, dusty 2.5-acre barbed-wire camp include novels, like love stories and Arab legends, with "1001 Arabian Nights" on order. The inmates regularly drink sweet tea, although though it is warm, not hot, in case they try to throw it on a guard. Curried chicken has been added to the dinner menu.

This week, prisoners who were having trouble reading were given glasses. The detainees are allowed to talk with each other, and officials have grouped them by language. They can call out to reporters to proclaim their innocence without being punished. They apparently receive first-class medical care – a neurologist and a thoracic surgeon were recently flown in.

Some prisoners were seen this week riding in golf carts. Officials said they started using the motorized carts to

transport the prisoners to the interrogation huts, several hundred feet away, because it was quicker and because the prisoners' leg shackles were rubbing their ankles raw when they had to walk there.

Brig. Gen. Michael R. Lehnert, the marine who commands the task force overseeing the prison camp, said the privileges were useful tools in maintaining discipline because what was given could be taken away.

"You can't do much with a detainee if they have nothing," he said.

But since the first prisoners arrived on Jan. 11, almost none of the privileges has been revoked. General Lehnert said he was reluctant to revoke any, even though the prisoners have been "acting out," because he did not want to encourage them.

"Quite often, what the detainees want is a reaction," he said. "They would like to be able to demonstrate, 'Look at what's happening to me! I'm being punished.'"

There are 300 prisoners, from at least 32 countries, being held in the camp's 8 foot by 8 foot chain-link cages. Some are quite young, in their early teens, but most are in their 20's and 30's. There is at least one father and son. The prisoners have close-shaved heads, but many are growing beards. Some have started doing push-ups and sit-ups. They are let out into a small pen for 15 minutes twice a week for exercise, and many pray five times a day.

Still, military officials say the prisoners are enormously frustrated and angry because their future is so uncertain. Officials here say the prisoners' fates are up to Washington. But the Bush administration has given no indication

of what it intends to do with them after they are interrogated, has set no timetable for the questioning, and has not lodged any charges against them.

General Lehnert said most of the prisoners were either "high-ranking Taliban" or suspected Al Qaeda terrorist, but the deputy camp commander, Lt. Col. Bill Cline, said some were "victims of circumstance" and probably innocent.

Secretary of Defense Donald H. Rumsfeld has said that any number of things could happen to the prisoners, including their being held indefinitely.

In any case, the military is preparing here for the long term. Bulldozers are clearing ground on a cliff overlooking the Caribbean, and construction is to begin this weekend on a permanent $16 million camp there that can hold up to 2,000 inmates.

The idea of being moved to a permanent camp has left many prisoners anxious, officials say, and their "acting out" has taken many forms. They have yelled to their guards that they are going to kill them. They have thrown gravel at them.

Many of the prisoners have been on a hunger strike intermittently since Feb. 27, although the number refusing food and drink has steadily dwindled.

"We've been on a hunger strike for 14 days, and nobody cares!" one prisoner yelled in English at a reporter who was being given a tour around the perimeter. "We need the world to know about us. We are innocent here in this place. We've got no legal rights. Nothing. So can somebody know about us? Can you tell the world about us?"

General Lehnert said that if such yelling became disruptive to the camp, he would "put a stop to it," but that it had not yet reached that point. He added that he considered the prisoners "media savvy and shrewd."

In any case, he told reporters, if the yelling turned into a problem, reporters, who are kept on a very short leash here by the military, would be given even less access. "Most likely, to tell you the truth, we may end up moving you back so that you can no longer provide the catalyst for them to do those things," he said.

To help ease the tension, General Lehnert has taken to addressing the prisoners once a week over a loudspeaker at the camp, and did so today for the third time. He told them that their move to the more permanent cells "does not mean that you will remain here forever if you have done nothing wrong," leaving unsaid what would happen to them if they had done something wrong.

General Lehnert said repeatedly that he did not have control over their future. "Nothing you or I can do will either delay or speed the actions of those who will determine your future," he told them. "I cannot honestly tell you what will happen to you or how long you will be here." He offered them little hope, except to say their lives would "continue to improve" if they followed the rules.

Colonel Cline said he did not perceive the situation as a explosive, but he knows the prisoners are watching their captors and sizing them up.

"I don't sense a powder keg, but they're watching us 24/7," he said. "They're watching what we do, they're watching what time we do it, they're watching how we do it. They're scheming." One of the advantages of giving them books to

read, he said, is that it takes their eyes of the guards, at least for a while.

"There's not much that they want for here," he added, "except their freedom."

United States Department of Defense,
News Transcript

Excerpt from Interview with Secretary of Defense,
Donald H. Rumsfeld

February 27, 2002

(Interview with Cale Ramaker, KSPT-ABC, St. Paul, Minn.)

* * *

Question: And the situation in Camp X-Ray right now in Guantanamo Bay, Cuba with the detainees, give us an update on where that's at in terms of the investigation, interrogating all of them, and then what happens to the detainees once you're done with them.

Rumsfeld: You bet. There are, I don't know, 300 or 400 people down there at the present time, I suppose 300 something, and they have all now, except for one or two, been questioned and interrogated, looking for intelligence information so that we could stop other terrorist threats, people from attacking our country and our friends and allies and our deployed forces.

We're now starting the process of doing a series of interrogations that involve law enforcement. That is to say to determine exactly what these individuals have done. Not what they know of an intelligence standpoint, but what they've done from a law enforcement standpoint. That process in underway.

United States Department Of Defense, News Transcript

Excerpt From News Briefing With Secretary Of Defense Donald H. Rumsfeld And Chairman, Joint Chiefs Of Staff General Richard Myers

Thursday, March 28, 2002

* * *

Finally a word about military commissions. There have been some murmurs in the media about detainees held at Guantanamo Bay, and specifically whether if one who is tried by a military commission and, if acquitted, whether they would then be released or whether they would still be detained. Let me explain this. During the course of this war effort, the United States has detained several hundred enemy combatants. As has been the case in previous wars, the country that takes prisoners generally decides that they would prefer them not to go back to the battlefield. They detain those enemy combatants for the duration of the conflict. They do so for the very simple reason, which I would have thought is obvious – namely to keep them from going right back and in this case killing more Americans and conducting more terrorist acts. Any combatants who have the good fortune of being captured instead of killed during an armed conflict are normally not in a position to challenge their continued detention. To release enemy captives so that they could return to the battlefield would put the lives of more young American servicemen at risk, and in my view would be mindless.

Let me explain the issue in detail, since it seems to be troubling some people.

Out of the detainees there may be some who committed serious problems and who, if the president were to decide, might be assigned to a military commission to be tried on one or more of those charges. If one were to be acquitted by a commission of, for example, a specific criminal charge, that would not necessarily change the fact that that individual remains an enemy who was captured during an armed conflict and therefore one who could reasonably be expected to go back to his terrorist ways if released. It might – the procedures we put in place for the commission to provide full and fair trials. In some cases it might not be possible to establish beyond a reasonable doubt that an individual committed a particular crime, and therefore he might be acquitted of that crime. However, it does not change the fact that he is an enemy combatant. He may be guilty of other crimes, but at the minimum he is someone to be kept off the battlefield, from going right back and killing more Americans.

Even in a case where an enemy combatant might be acquitted, the United States would be irresponsible not to continue to detain them until the conflict is over. Detaining enemy combatants for the duration of a conflict is universally recognized as responsible and lawful. This is fully consistent with the Geneva Conventions and other war authorities. This is a matter of simple common sense, I would say. The detainees include dangerous terrorists who committed brutal acts and are sworn to go back to do it again. To protect the American people, the United States has every right to hold enemy combatants for the duration. Today the conflict is still going on. Our troops are still fighting in Afghanistan, and we do not as yet see an end. That said, we will continue to treat detainees humanely and consistent with the principles of the Geneva

Convention. We will proceed with trials. In some cases we will proceed with transfers to another country – their country of nationality in some cases, and in some cases releases if in fact the additional information proves that they are individuals who could be released without risk to – that they might conduct additional terrorists acts or go back to the battlefield to oppose what we are doing.

I can assure you the United States does not want to keep any of them any longer than we have to. While we will treat them humanely and lawfully, we will do everything we can to protect the American people and our friends and allies from being attacked again. And we have no intention of releasing people who have shown that they are dedicated to killing more Americans.

* * *

Supreme Court, U.S.
FILED
OCT 3 _ 2003
OFFICE OF THE CLERK

(9) (9)

Nos. 03-334 and 03-343

In the Supreme Court of the United States

SHAFIQ RASUL, ET AL., PETITIONERS

v.

GEORGE W. BUSH, ET AL.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
DAVID B. SALMONS
Assistants to the Solicitor General

DOUGLAS N. LETTER
ROBERT M. LOEB
CATHERINE Y. HANCOCK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly held that, under *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), United States courts lack jurisdiction to consider challenges to the legality of the detention of aliens captured abroad in connection with ongoing hostilities and held outside the sovereign territory of the United States at the Guantanamo Bay Naval Base, Cuba.

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In the Supreme Court of the United States

No. 03-334

SHAFIQ RASUL, ET AL., PETITIONERS

v.

GEORGE W. BUSH, ET AL.

No. 03-343

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-29a)[1] is reported at 321 F.3d 1134. The opinion of the district court (Pet. App. 32a-64a) is reported at 215 F. Supp. 2d 55.

[1] All citations to the Petition Appendix refer to the appendix accompanying the petition in No. 03-334.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2003. Rehearing was denied on June 2, 2003 (Pet. App. 30a-31a). The petition for a writ of certiorari in No. 03-334 was docketed on September 3, 2003, and the petition for a writ of certiorari in No. 03-343 was docketed on September 5, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 11, 2001, the al Qaeda terrorist network launched a vicious, coordinated attack on the United States, murdering approximately 3000 persons. In response, the President, in his capacity as Commander in Chief, took steps to protect the homeland and prevent additional threats. Congress backed the President's use of force against the "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist [September 11] attacks * * * or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224. Congress emphasized that the forces responsible for the September 11th attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Ibid.*

The President dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime. In the course of that campaign—which remains ongoing—the United States and its allies have captured or taken control of thousands of individuals. As in virtually every other major armed conflict in the

Nation's history, the military has determined that many of those captured in connection with the hostilities in Afghanistan should be detained during the ongoing conflict as enemy combatants. Such detention serves the vital objectives of preventing combatants from continuing to aid our enemies and gathering intelligence to further the overall war effort. The military's authority to capture and detain such combatants is both well-established and time-honored. See, *e.g.*, *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313-314 (1946); *Ex parte Quirin*, 317 U.S. 1, 30-31 & n.8 (1942); L. Oppenheim, *International Law* 368-69 (H. Lauterpacht ed., 7th ed. 1952); W. Winthrop, *Military Law and Precedents* 788 (2d ed. 1920).

The United States military has transferred some of these combatants from Afghanistan to the United States Naval Base at Guantanamo Bay, Cuba. The Guantanamo Naval Base is in the sovereign territory of the Republic of Cuba. The United States occupies the base under a 1903 Lease Agreement with Cuba, which was extended by a 1934 Treaty.[2] The Lease Agreement specifically provides that Cuba retains sovereignty over the leased lands:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased area], on the other hand the Republic of Cuba consents that during the period of the occupation by the United

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[2] See Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (Lease Agreement); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866 (extending lease "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations").

> States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas * * * .

Lease Agreement art. III, T.S. No. 418 (6 Bevans at 1113). A supplemental agreement between the two nations further provides that the United States may not permit anyone "to establish or maintain a commercial, industrial or other enterprise" on Guantanamo. Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. III, T.S. No. 426. That provision is compatible with Cuba's explicit retention of "ultimate sovereignty" over Guantanamo under the Lease Agreement quoted above.

The President has announced that "[t]he United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949." Office of the White House Press Secretary, Fact Sheet, *Status of Detainees at Guantanamo* 1 (Feb. 7, 2002) <www.whitehouse.gov/news/releases/2002/02/20020207-13.html>. In the past year and a half, more than 60 Guantanamo detainees who the military has determined should no longer be detained for intelligence-gathering or other purposes have been released or repatriated to the custody of other nations.

2. On February 19, 2002, individuals claiming to be the parents of three British and Australian nationals detained at Guantanamo filed a petition for habeas corpus as the "next friends" of those detainees. *Rasul* v. *Bush*. The detainees at issue in *Rasul* (No. 03-334) are aliens who were captured in connection with the

military campaign in Afghanistan. The habeas petition challenged, *inter alia*, the legality of those aliens' detention and named as respondents the President, Secretary of Defense, and two military commanders at Guantanamo. Pet. App. 4a. The government moved to dismiss the petition, *inter alia*, for lack of jurisdiction on the ground that, under *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), United States courts lack jurisdiction over claims filed by or on behalf of aliens, like the Guantanamo detainees, who are detained outside of the sovereign territory of the United States.

On May 1, 2002, a second action, *Al Odah* v. *United States*, was filed on behalf of another group of Guantanamo detainees against the President, Secretary of Defense, Chairman of the Joint Chiefs of Staff, two military commanders at Guantanamo, and the United States. The plaintiffs in *Al Odah* (No. 03-343) claim to be the relatives of twelve Kuwaiti nationals who were captured abroad in connection with the hostilities in Afghanistan and are being detained by the United States military at Guantanamo. Although invoking the district court's jurisdiction under, *inter alia*, the federal habeas statute, the *Al Odah* plaintiffs declined to style their action as a petition for a writ of habeas corpus and instead purported to challenge the legality of the captured aliens' detention under the Alien Tort Statute (ATS), 28 U.S.C. 1350, the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and directly under the Fifth Amendment to the Constitution. They sought, *inter alia*, an order declaring that the aliens' detention is arbitrary and unlawful, and an order providing them an opportunity to consult with counsel. Pet. App. 3a-4a.

The *Al Odah* plaintiffs moved to consolidate their case with *Rasul* for the purpose of resolving the jurisdiction issue and moved for a preliminary injunction to

enjoin defendants from continuing to detain the 11 Kuwaiti plaintiffs now under custody of the United States without granting them certain relief. Pet. App. 37a. In response, the government moved to dismiss *Al Odah* because, *inter alia*, the court lacked jurisdiction under *Eisentrager*.

3. On July 30, 2002, after holding a consolidated hearing in both cases on the jurisdictional issue, the district court granted the government's motions to dismiss in *Rasul* and *Al Odah*. Pet. App. 32a-64a. The district court held that "*Eisentrager*, and its progeny, are controlling and bars the Court's consideration of the merits of these two cases." *Id.* at 48a (citation omitted). The court explained that, "[i]f an alien is outside the country's sovereign territory, then courts have generally concluded that the alien is not permitted access to the courts of the United States to enforce the Constitution." *Id.* at 55a. Because the detainees in these cases are aliens held abroad, the court held that, under *Eisentrager*, it lacked jurisdiction over their claims. *Id.* at 62a.

The district court rejected the petitioners' argument that *Eisentrager* applies only to the detention of "enemy" aliens. The court explained (Pet. App. 51a) that *Eisentrager* "did not hinge on the fact that the petitioners were enemy aliens," but instead "broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus." *Id.* at 54a. In addition, the court rejected petitioners' argument to circumvent *Eisentrager* by arguing that the United States exercises "de facto" control over Guantanamo. As the court explained, *Eisentrager* "never qualified its definition of sovereignty" based on a "*de facto* theory of sovereignty." *Id.* at 56a. Accordingly, because "[i]t is undisputed, even by the parties, that Guantanamo Bay is not part of the sovereign territory of the United States," the court concluded that *Eisentrager* bars the court's jurisdiction. *Id.* at 55a, 63a.

4. a. The court of appeals affirmed. Pet. App. 1a-29a. The court concluded that "the detainees [in these cases] are in all relevant respects in the same position as the prisoners in *Eisentrager*" and thus held that, under *Eisentrager*, "the [United States] courts are not open to them." *Id.* at 18a.

The court of appeals rejected petitioners' attempt to distinguish *Eisentrager* "on the ground that the prisoners there were 'enemy aliens.'" Pet. App. 7a. As the court explained, although "the Supreme Court referred to the *Eisentrager* prisoners as 'enemy aliens," *id.* at 8a-9a, "*Eisentrager* itself directly tied jurisdiction to the extension of constitutional provisions," *id.* at 13a. In particular, the court observed, *Eisentrager* stated that, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Ibid.* (quoting 339 U.S. at 771). That aspect of *Eisentrager*, the court of appeals explained, was reaffirmed by this Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990). Pet. App. 11a-12a.

Moreover, the court of appeals continued, *Eisentrager* stated that "the 'privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in the country implied protection.'" Pet. App. 13a. (quoting 339 U.S. at 777-778) (emphasis added by court of appeals). In declining to subject the overriding jurisdictional question in this case to "factual determinations at the threshold" on matters such as an alien's "enemy"

status, the court further reasoned that "the Court in *Eisentrager* did not decide to avoid all the [separation-of-powers] problems exercising jurisdiction would have caused, only to confront the same problems in determining whether jurisdiction exists in the first place." *Ibid.* Accordingly, the court of appeals concluded that *Eisentrager* applies "regardless of whether [the Guantanamo detainees] are enemy aliens." *Id.* at 11a.[3]

The court of appeals likewise rejected petitioners' argument that *Eisentrager* is distinguishable on the ground that the United States exercises de facto control or territorial jurisdiction over Guantanamo Bay. Pet. App. 14a-17a. The court "disagree[d] with the detainees that the *Eisentrager* opinion interchanged 'territorial jurisdiction' with 'sovereignty,' without attaching any particular significance to either term." *Id.* at 16a. Furthermore, the court explained, the United States' Lease Agreement with Cuba explicitly "shows that Cuba—not the United States—has sovereignty over Guantanamo." *Id.* at 15a. For that reason alone, the court continued, Guantanamo Bay is unlike "the geographic area of the States" and "insular possessions" over which the United States *does* exercise sovereignty. *Id.* at 16a.

[3] The court of appeals rejected the government's argument that "the Guantanamo detainees are within the category of 'enemy aliens,' at least as *Eisentrager* used the term." Pet. App. 10a. But at the same time, the court emphasized that "the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*." *Ibid.* As the court explained, the Guantanamo detainees "too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States." *Ibid.*

The court of appeals also concluded that petitioners could not avoid *Eisentrager* by asserting non-habeas claims under the ATS or APA. As the court observed, "[t]he holding in *Eisentrager*—that 'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign, (339 U.S. at 777-778)—dooms these additional causes of action, even if they deal only with conditions of confinement and do not sound in habeas." Pet. App. 17a-18a. Moreover, the court continued, "[n]othing in *Eisentrager* turned on the particular jurisdictional language of any statute; everything turned on the circumstances of those seeking relief, on the authority under which they were held, and on the consequences of opening the courts to them." *Id.* at 18a. "With respect to the detainees [at Guantanamo]," the court held, "those circumstances, that authority, and those consequences differ in no material respect from *Eisentrager*." *Ibid.*

b. Judge Randolph concurred separately to address additional "grounds for rejecting the detainees' non-habeas claims" under the ATS and the APA. Pet. App. 19a-29a. As he stated, however, it was "unnecessary" for the court to decide those additional grounds for rejecting petitioners' claims "because *Eisentrager* disposes of the cases." *Id.* at 26a. Judges Garland and Williams did not take issue with the reasoning of Judge Randolph's concurrence, but declined to join the concurrence because they "believe[d] the issues addressed need not be reached." *Id.* at 19a n.*.

5. Petitioners sought rehearing en banc. The court of appeals denied rehearing with no member of the court indicating dissent from the denial of rehearing. Pet. App. 30a-31a.

ARGUMENT

More than 50 years ago, in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), this Court held that aliens captured and detained abroad lack "capacity and standing to invoke the process of federal courts." *Id.* at 790. Both the court of appeals and the district court below correctly concluded that this Court's decision in *Eisentrager* forecloses petitioners' efforts to invoke the jurisdiction of United States courts to challenge the legality of the military's detention of aliens held abroad at Guantanamo. The court of appeals' unanimous decision does not conflict with any other decision of this Court or of any other court of appeals. The petitions for certiorari accordingly should be denied.

1. In *Johnson* v. *Eisentrager*, *supra*, this Court declined to exercise jurisdiction over a habeas petition filed by German nationals who had been seized by the United States armed forces in China after the German surrender in World War II, tried by military commission, and subsequently imprisoned in a United States military prison in Landsberg, Germany. See 339 U.S. at 765-767. The Court held that the prisoners lacked "access to our courts" (*id.* at 777) to challenge their detention because they were aliens seized and held outside the sovereign territory of the United States.

The *Eisentrager* Court emphasized that aliens are accorded rights under the Constitution and the laws of the United States only as a consequence of their *presence* within the United States. As the Court put it, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." 339 U.S. at 771. The *Eisentrager* Court held that the "privilege

of litigation" was unavailable because "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 777-778. The Court further held that the prisoners could not invoke the writ of habeas to vindicate the Fifth Amendment, because, as aliens abroad, they had no Fifth Amendment rights. See *id.* at 781-783.

The *Eisentrager* Court underscored the fundamental nature of its jurisdictional ruling. The Court specifically framed the jurisdictional question before it as "one of jurisdiction of civil courts." 339 U.S. at 765. Moreover, in resolving that issue, it referred in broad terms to: the Judiciary's "power to act" vis-a-vis military authorities with respect to aliens held abroad, *id.* at 771; the standing of such individuals "to maintain any action in the courts of the United States," *id.* at 776; the "standing [of such individuals] to demand access to our courts," *id.* at 777; and the "capacity and standing to invoke the process of federal courts," *id.* at 790. Similarly, the Court spoke of "the privilege of litigation" in United States courts, and discussed its concerns about the use of "litigation [as a] weapon" by aliens held by military authorities overseas. *Id.* at 777-779.

The *Eisentrager* Court also stressed that judicial review of the claims of aliens seized overseas by the military in a time of war would interfere with the President's authority as Commander in Chief, which "has been deemed, throughout our history, as essential to war-time security." 339 U.S. at 774. As the Court explained, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very

enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Id.* at 779. "Nor is it unlikely," the Court continued, "that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." *Ibid.*

The court of appeals correctly applied *Eisentrager* to the claims filed on behalf of the detainees in these cases and held that it lacked jurisdiction. Pet. App. 8a-16a. Indeed, the central underpinnings of this Court's holding in *Eisentrager* are equally present here. As every court to consider the issue has concluded (see pp. 24-26, *infra*), the Guan-tanamo detainees are in all material respects indistinguishable from the prisoners in *Eisentrager*. First, the Guantanamo detainees, just like the prisoners in *Eisentrager*, are aliens with no connection to the United States. Second, the Guantanamo detainees, just like the prisoners in *Eisentrager*, were taken into the custody of the United States military overseas and are being held outside the sovereign territory of the United States. Accordingly, as the court of appeals unanimously held, *Eisentrager* is controlling here.

2. The court of appeals and the district court below carefully considered and correctly rejected petitioners' various attempts to circumvent the clear import of *Eisentrager*. Pet. App. 7a-17a (court of appeals); *id.* at 49a-63a (district court).

a. Petitioners argue (03-334 Pet. 10, 18-19; 03-343 Pet. 18-19) that *Eisentrager* is inapplicable on the ground that the detainees in this case are not "enemy" aliens. As the court of appeals explained, that is incorrect. Pet. App. 6a-13a; see *id.* at 51a-55a. Although the

Eisentrager Court referred to the prisoners as "enemy aliens," its holding was not dependent on the aliens' status as enemies, but rather on the aliens' lack of presence inside the sovereign territory of the United States. *Id.* at 11a. The *Eisentrager* Court emphasized that "the privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in the country implied protection." 339 U.S. at 777-778 (emphasis added). The dissenters in *Eisentrager* likewise appreciated that the Court's decision "inescapably" applied to "any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared." *Id.* at 796 (Black, J., dissenting).

Moreover, this Court has repeatedly cited *Eisentrager* as a seminal decision defining the application of the Constitution to *all* aliens abroad, not simply *enemy* aliens. See, *e.g.*, *DeMore* v. *Kim*, 123 S. Ct. 1708, 1730 (2003); *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001); *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). As the court of appeals noted (Pet. App. 11a), in *Verdugo-Urquidez*, the Court—citing *Eisentrager*—explained that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." 494 U.S. at 269. So too, in *Zadvydas*, the Court—again pointing to *Eisentrager*—stated that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas*, 533 U.S. at 693. More recently, in *Demore*, which was decided a month after the court of appeals' decision in these cases, the Court again cited *Eisentrager* for the proposition that aliens present in the United States enjoy

rights not available to aliens outside the Nation's borders. 123 S. Ct. at 1730.

In any event, the Guantanamo detainees qualify as "enemy aliens" for purposes of *Eisentrager* because they were seized in the course of active and ongoing hostilities against United States and coalition forces. Cf. *United States* v. *Terry*, 36 C.M.R. 756, 761 (A.B.R. 1965) ("The term 'enemy' applies to any forces engaged in combat against our own forces."), aff'd, 36 C.M.R. 348 (C.M.A. 1966). Nothing in *Eisentrager* suggests that an "enemy alien" is limited to a national of a country that has formally declared war on the United States. Although *Eisentrager* noted that under international law all nationals of a belligerent nation become "enemies" of the other upon a declaration of war, see 339 U.S. at 769-773 & n.2, the Court stressed that it did not need to rely on that "fiction" because the detainees were "actual enemies, active in the hostile service of an enemy power." *Id.* at 778. The same is true of the Guantanamo detainees here.

The "enemy" status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches. See, *e.g.*, *The Three Friends*, 166 U.S. 1, 63 (1897); *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862). The President, in his capacity as Commander in Chief, has conclusively determined that the Guantanamo detainees—both al Qaeda and Taliban—are not entitled to prisoner-of-war status under the Geneva Convention. See Office of the White House Press Secretary, Fact Sheet, *Status of Detainees at Guantanamo*, *supra*; *United States* v. *Lindh*, 212 F. Supp. 2d 541, 554-555 (E.D. Va. 2002). Any effort to look beyond such an executive determination at the jurisdictional threshold would conflict with the rationale of *Eisentrager*. As the *Eisentrager* Court emphasized, exercising jurisdiction over the claims of aliens held abroad during wartime would directly, and perhaps gravely, interfere with the Executive's conduct of the war and divert the attention of the military from ongoing hostilities abroad to courtrooms at home. See 339 U.S. at 778-779. So too, allowing detainees to invoke the courts to litigate their "enemy" status to determine whether jurisdiction exists under *Eisentrager* would invite the same dangers that the Court wisely avoided in *Eisentrager*. As the court below aptly observed, "the Court in *Eisentrager* did not decide to avoid all the [separation-of-powers] problems exercising jurisdiction would have caused, only to confront the same problems in determining whether jurisdiction exists in the first place." Pet. App. 13a.

b. Nor, as the courts below correctly held, is there any basis for distinguishing *Eisentrager* on the ground that Guantanamo is under the "de facto control" of the United States. See Pet. App. 14a-17a; *id.* at 55a-63a. *Eisentrager* itself makes clear that its jurisdictional rule is based on sovereignty, and not on malleable concepts like de facto control. In particular, in explaining why "the privilege of litigation" did not extend to the aliens in *Eisentrager*, the Court stated that the "prisoners at no relevant time were within any *territory over which the United States is sovereign*." 339 U.S. at 777-778 (emphasis added).

Like the prisoners in *Eisentrager*, the Guantanamo detainees are being held outside the sovereign territory of the United States. The United States uses and occupies the Guantanamo Naval Base under a lease with the Republic of Cuba. Although Cuba "consents" to permit the United States to "exercise complete jurisdiction and control" of the base, the Lease Agree-

ment between Cuba and the United States provides that Cuba retains "ultimate sovereignty" over the naval base. Lease Agreement, art. III, T.S. No. 418 (6 Bevans at 1113), quoted pp. 3-4, *supra*.[4] As this Court has explained, the "determination of sovereignty over an area is for the legislative and executive departments," and not a question on which a court may second-guess the political branches. *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 380 (1948).[5]

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[4] The Lease Agreement was executed in both English and Spanish, and both authoritative texts confirm Cuba's ongoing sovereignty over Guantanamo Bay. The Spanish phrase in Article III for "ultimate sovereignty" is "soberania definitiva." The word "definitiva" belies any assertion that "ultimate" as used in Article III means only "eventual." Instead, it is defined in *Diccionario Salamanca* 472 (1996) as "que no admite cambios," or, in English, "not subject to change." Similarly, "ultimate" itself is more naturally defined in this context as "basic, fundamental, original, primitive." *Webster's Third New International Dictionary* 2479 (1993). As this Court explained in *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 88 (1833), "[i]f the English and the Spanish parts [of a treaty] can, without violence, be made to agree, that construction which establishes this conformity ought to prevail." Thus, the terms "definitiva" and "ultimate" are equally understood to affirm Cuba's sovereignty over the leased territory.

[5] The Executive Branch opinions cited by petitioners (03-334 Pet. 20) do not in any way undermine that conclusion. Indeed, those opinions—which address issues far afield from the question presented here—specifically recognize that the United States' lease agreement with Cuba reserves to Cuba the "ultimate sovereignty" over Guantanamo, 35 Op. Att'y Gen. 536, 537 (1929) (quoting Lease Agreement) (addressing whether Guantanamo is a "possession" of the United States within the meaning of the tariff law), and that, under that agreement, Guantanamo thus lies "*outside* the territorial United States," 6 Op. Office of Legal Counsel 236, 238 (1982) (emphasis added) (addressing whether the installation of slot machines at Guantanamo is barred by the Anti-Slot Machine Act).

Moreover, this Court has already recognized that leased United States military installations abroad lie outside the sovereign territory of the United States. In *United States* v. *Spelar*, 338 U.S. 217, 219 (1949), the Court held that a United States military base leased in Newfoundland was "subject to the sovereignty of another nation," not "to the sovereignty of the United States," and therefore fell within the "foreign country" exception to the Federal Tort Claims Act. The base in *Spelar* was governed by "the same executive agreement and leases" as the United States military base in Bermuda. *Id.* at 218. In *Vermilya-Brown*, this Court recognized that the United States' rights over the base in Guantanamo are "substantially the same" as its rights over the base in Bermuda. 335 U.S. at 383.[6] The Guantanamo Naval Base, therefore, clearly lies outside the sovereign territory of the United States—and, indeed, as noted above, that much is "undisputed" by petitioners. Pet. App. 55a.[7]

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[6] Other lower courts that have considered the status of Guantanamo have likewise concluded that it lies outside the United States' sovereign territory. See also *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1425 (11th Cir.) (rejecting argument that control and jurisdiction of Guantanamo "is equivalent to sovereignty"), cert. denied, 515 U.S. 1142 (1995); *Bird v. United States*, 923 F. Supp. 338, 343 (D. Conn. 1996) ("sovereignty over the Guantanamo Bay does not rest with the United States").

[7] Petitioners cite *United States* v. *Lee*, 906 F.2d 117 (4th Cir. 1990) (per curiam), for the proposition that crimes committed at Guantanamo may be prosecuted in the United States courts. But petitioners overlook that the *Lee* court exercised jurisdiction over the indictment in that case pursuant to provisions that extend the criminal law extraterritorially to "crimes committed outside the jursdiction of a state or district court." 906 F.2d at 117 n.1. That certain laws may apply *extra*territorially to Guantanamo only

In addition, if, as petitioners contend, de facto control is sufficient to establish sovereignty for purposes of *Eisentrager*, then the prisoners in *Eisentrager* themselves would have been entitled to judicial review of their habeas claims. The Landsberg prison in Germany was undeniably under the control of the United States when Eisentrager was held there. See 339 U.S. at 766, 768 n.1 (prisoners were under custody of "American Army officer" who was the "Commandant of Landsberg prison" and noting similar cases of "aliens confined by *American* military authorities abroad" (emphasis added). As Justice Black stated in his dissent in *Eisentrager*, "[w]e control that part of Germany we occupy." *Id.* at 797. The United States similarly controls Guantanamo, but, as the majority held in *Eisentrager*, in the absence of sovereignty, such control does not entitle the aliens held at Guantanamo to the privilege of litigating in United States courts.

c. Petitioners attempt (03-334 Pet. 14; 03-343 Pet. 16-17) to distinguish *Eisentrager* on the ground that the detainees in that case had been convicted by a military commission. But, as the district court observed, "[w]hile it is true that the petitioners in *Eisentrager* had already been convicted by a military commission, the *Eisentrager* Court did not base its decision on that distinction. Rather, *Eisentrager* broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus." Pet. App. 54a (citation omitted). Moreover, under petitioners' reading of *Eisentrager*, aliens captured and held abroad would have access to the United States courts in the earliest stages of their

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reinforces the conclusion that the base lies outside the sovereign territory of the United States. See Pet. App. 14a-15a.

detention, but not after hostilities had ended and the detainees had been convicted of military charges years later. Nothing in *Eisentrager* supports that counter-intuitive result. Accordingly, the fact that the President has not determined how each of the Guantanamo detainees should ultimately be treated, including whether they should be charged pursuant to his military order or returned to their countries of origin, provides no reason to avoid *Eisentrager*.

Indeed, the timing of this litigation if anything only exacerbates the concerns that this Court stressed in *Eisentrager* about judicial interference with military affairs committed to the political branches. Whereas the habeas action in *Eisentrager* did not reach the Supreme Court until years after the hostilities of World War II had ceased, this litigation challenges the President's military detentions while American soldiers and their allies are still engaged in armed conflict overseas against an unprincipled, unconventional, and savage foe. See Associated Press, *Suspected Taliban Fighters Kill American in Gun Battle*, Wash. Post, Oct. 1, 2003, at A12 ("Suspected Taliban fighters killed an American soldier and wounded two others in a gun battle Monday that underscored the stiffening resistance of insurgents nearly two years after a U.S.-led coalition ousted the Taliban from power."). The potential for interference with the core war powers of the President in this litigation is therefore even more acute in this case than it was in *Eisentrager*. Indeed, even the dissenters in *Eisentrager*, the only Justices who thought that there was jurisdiction in that case and therefore had the need to consider the political question issue, acknowledged that courts should not interfere

"while hostilities are in progress." 339 U.S. at 796 (Black, J., dissenting).[8]

3. Contrary to petitioners' contentions (03-334 Pet. 24-28; 03-343 Pet. 24-25, 27-28), the court of appeals' unanimous decision in these cases does not conflict with any decision of this Court or of any other court of appeals.

a. Petitioners argue (03-334 Pet. 25 & n.17) that courts, relying on the so-called "Insular Cases," have extended certain "fundamental constitutional rights to non-resident aliens in the Canal Zone, the Trust Territories, and the American Sector in post-war Berlin." By analogy, petitioners argue (03-334 Pet. 26) that these same rights should inhere to aliens held at Guantanamo Bay where the United States maintains "exclu-

[8] The extraordinary circumstances in which this litigation arises and the particular relief that petitioners seek implicate core political questions that the Constitution leaves to the President as Commander in Chief. Petitioners ask the courts to opine on the legality of the President's ongoing military operations and to release individuals who were captured during hostilities and who the military has determined should be detained. Particularly where hostilities remain ongoing, the courts have no jurisdiction, and no judicially-manageable standards, to evaluate or second-guess the conduct of the President and the military. These questions are constitutionally committed to the Executive Branch. That is particularly true where, as here, the President is acting with the full backing of Congress. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring); see also *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2386-2387 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654, 668- 669 (1981). Accordingly, although the courts below did not need to reach the issue because they properly concluded that *Eisentrager* itself requires dismissal, the political question doctrine provides an additional, and independently sufficient, basis for dismissing these actions.

sive jurisdiction and control." That analogy is fundamentally flawed. To begin with, Guantanamo is not a territory, or even an unincorporated territory like Guam or Puerto Rico. Rather, it is a military base on foreign soil; as explained above, under the United States' lease agreement with Cuba, Cuba retains sovereignty over Guantanamo. For that reason alone, the decision below in no way conflicts with any of the Insular Cases or their progeny.

More fundamentally, the application of *Eisentrager* turns on the existence, or not, of United States sovereignty over an area, and not on United States' jurisdiction or control over an area. The Insular Cases are not inconsistent with that rule. To the contrary, as this Court explained in *Verdugo-Urquidez*, they simply specify "that not every constitutional provision applies to governmental activity *even where the United States has sovereign power.*" 494 U.S. at 268 (emphasis added). The Insular Cases therefore do not help the detainees in this case, who are being held in a land over which the United States *lacks* sovereignty.[9]

b. Petitioners argue (03-334 Pet. 26-27) that the decision below conflicts with *Ralpho* v. *Bell*, 569 F.2d 607 (D.C. Cir. 1977), which held that due process principles may apply in the Trust Territory of Micronesia. See *id.* at 619 & n.71. The court below, however, correctly distinguished *Ralpho*. Pet. App. 16a-17a. That

[9] Petitioners likewise suggest (03-334 Pet. 16) that the decision below conflicts with *Reid* v. *Covert*, 354 U.S. 1 (1957). As this Court itself underscored in *Verdugo-Urquidez*, however, *Reid* only "decided that United States citizens stationed abroad could invoke the protections of the Fifth and Sixth Amendments." 494 U.S. at 270. Thus, as was true for the alien defendant in *Verdugo-Urquidez*, the *aliens* on whose behalf these actions were brought "can derive no comfort from the *Reid* holding." *Ibid.*

case did not involve the detention of aliens abroad, but instead concerned a court's jurisdiction to review a claim to a hearing under the Micronesian Claims Act. See 569 F.2d at 611-612. Moreover, the court's decision in *Ralpho* that Micronesian residents enjoyed due process rights was based on its conclusion that the Trust Territory was equivalent to other American territories, which are accorded due process rights.[10] See *id.* at 619; see also *Gale* v. *Andrus*, 643 F.2d 826, 832-833 (D.C. Cir. 1980). The military base at Guantanamo is not, and is not remotely like, an American territory. For those reasons, the court correctly distinguished *Ralpho*, but even if there were any tension between the District of Columbia Circuit's decision in

[10] Guantanamo is a special-purpose enclave within a foreign country, which the United States occupies pursuant to a lease with Cuba, which in turn retains sovereignty over Guantanamo. By contrast, no other sovereign existed at the time of the appointment of the United States as administrator of the Micronesia Trust Territory. See Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665 (preamble). Likewise, the United States' operation of the Guantanamo base does not share any of the civilian governmental attributes of its special role with respect to the Trust Territory in Micronesia, and responsibility to "nurture the Trust Territory toward self-government." *Andrus*, 643 F.2d at 830; see 48 U.S.C. 1681(a). Furthermore, unlike Guantanamo, Congress has exercised Article IV powers with respect to Micronesia. See, *e.g.*, Proclamation 5564, 51 Fed. Reg. 40,399 (1986) (establishing the Northern Mariana Islands as United States territory and through Free Association compacts with the remaining portions of the former Trust Territories); Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (covenant to establish a Commonwealth of the Northern Mariana Islands in political union with the United States); Act of Nov. 8, 1977, Pub. L. No. 95-157, 91 Stat. 1265 (establishing a United States District Court in the Northern Mariana Islands).

Ralpho and its decision below, any such intra-circuit conflict would not merit this Court's review.[11]

c. Petitioners claim (03-334 Pet. 28; 03-343 Pet. 24) that *Haitian Centers Council, Inc.* v. *McNary*, 969 F.2d 1326 (2d Cir. 1992), vacated as moot *sub nom. Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 918 (1993), supports the notion that the United States' effective control over Guantanamo Bay is sufficient for them to invoke habeas relief in the United States courts. As the court of appeals explained, however, the Second Circuit's decision in *McNary* "has no precedential value because the Supreme Court vacated it." Pet. App. 15a. Furthermore, as the court of appeals also explained, the currency of the Second Circuit's vacated decision in *McNary* is further diminished by the fact that the decision is "at odds with the Supreme Court's reasoning not only in *Vermilya-Brown*, but also in *Spelar*," which reaffirm that "control is surely not the test" for deter-

[11] Petitioners' reliance (03-334 Pet. 25-26; 03-343 Pet. 25) on the Panama Canal Zone cases is similarly misplaced. The Fifth Circuit's holdings extending some constitutional rights to the Panama Canal Zone are based on that court's determination that the Canal Zone was an unincorporated territory and on its application of the Insular Cases. See *United States* v. *Husband R. (Roach)*, 453 F.2d 1054, 1057 (5th Cir. 1971); *Government of the Canal Zone* v. *Scott*, 502 F.2d 566, 568, 570 (5th Cir. 1974); *Government of the Canal Zone* v. *Yanez P. (Pinto)*, 590 F.2d 1344, 1351 (5th Cir. 1979). Congress also possessed Article IV powers with respect to the Canal Zone. See *Husband R.*, 453 F.2d at 1058-1059. Moreover, the Fifth Circuit's exercise of jurisdiction in those cases reflected the fact that the United States had established a United States federal district court for the Canal Zone, with appellate review in the Fifth Circuit. See Panama Canal Act, ch. 390, § 8, 37 Stat. 560, 565 (repealed 1979). Obviously there is no analogous district court with jurisdiction over Guantanamo. The Canal Zone cases are therefore also inapplicable.

mining when constitutional provisions may apply extraterritorially. *Id.* at 15a-16a.[12]

d. Contrary to petitioners' contention (03-334 Pet. 24; 03-343 Pet. 28), the court of appeals' decision also does not conflict with *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102 (1987). *Asahi* concerns the circumstances under which a foreign defendant—seeking to avoid jurisdiction—may be sued in a state court. See *id.* at 109-110. This litigation, however, involves the different question whether an alien held abroad may "demand access to our courts." *Eisentrager*, 339 U.S. at 777.[13]

4. Far from conflicting with any other decisions, the court of appeals' decision in this case is consistent with the decisions of the other courts that have considered habeas petitions filed on behalf of Guantanamo detainees. In *Coalition of Clergy* v. *Bush*, 189 F. Supp. 2d 1036 (C.D. Cal.), aff'd in part and vacated in part, 310 F.3d 1153 (9th Cir. 2002), cert. denied, 123 S. Ct. 2073 (2003), a coalition of clergy, lawyers, and professors filed a habeas petition on behalf of all the Guantanamo

[12] Petitioners' reliance (03-334 Pet. 28-29; 03-343 Pet. 25) on *United States* v. *Tiede*, 86 F.R.D. 227 (U.S. Ct. of Berlin 1979), is also misplaced. The *Tiede* court was an occupation court established by the United States Ambassador to Germany, not an Article III court. See U.S. High Commissioner Law No. 46, as amended. Its erroneous holding that aliens *abroad* enjoy full constitutional protections is plainly inconsistent with later controlling precedent. See, *e.g.*, *Zadvydas*, 533 U.S. at 693.

[13] Petitioners' reliance (03-343 Pet. 18-19) on *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), is also misplaced. That case concerned an alien who was detained at Ellis Island in New York. *Id.* at 207. The Court therefore had no occasion to consider whether aliens held abroad are entitled to the privilege of litigating in United States courts.

detainees, including the detainees in these cases. The district court held that the coalition lacked next-friend standing to maintain the action because it had no prior relationship whatsoever with the detainees. 189 F. Supp. 2d at 1040-1044. The court further held, however, that, even if the coalition had possessed next-friend standing, United States courts would lack jurisdiction to entertain the habeas petition under this Court's decision in *Eisentrager*. *Id.* at 1046-1050. Indeed, as the district court explained, the Guantanamo detainees are similar "[i]n all key respects" to the prisoners in *Eisentrager*. *Id.* at 1048.

On appeal, the Ninth Circuit affirmed the district court's decision that the coalition lacked next-friend standing to file a habeas petition on behalf of the Guantanamo detainees. 310 F.3d 1153, 1157. In addition, the Ninth Circuit noted that "[t]here is no question that the holding in [*Eisentrager*] represents a formidable obstacle to the rights of the detainees at [Guantanamo] to the writ of habeas corpus," and that *Eisentrager* "well matches the extraordinary circumstances" of the Guantanamo detentions. *Id.* at 1164 n.4. However, the Ninth Circuit vacated that portion of the district court's decision addressing *Eisentrager* on the ground that it was not necessary for the court to reach that issue in light of the fatal absence of next-friend standing. The plaintiffs in *Coalition of Clergy* petitioned for certiorari, challenging both the court of appeals' holding that next-friend standing was lacking and the district court's alternative holding that jurisdiction was lacking under *Eisentrager*. See 02-1155 Pet. i. This Court denied certiorari. 123 S. Ct. 2073 (2003).

In *Gherebi* v. *Bush*, 262 F. Supp. 2d 1064, 1066 (C.D. Cal. 2003), appeal pending, No. 03-55785 (9th Cir.

argued Aug. 11, 2003), another habeas petition was filed on behalf of a Guantanamo detainee, this time by an individual claiming to be the brother of a Guantanamo detainee. The district court—the same court that decided *Coalition of Clergy*—held that next-friend standing was present, but that *Eisentrager* "compels dismissal" of the petition for habeas relief. *Id.* at 1066-1067, 1068-1071.[14]

5. Petitioners object (03-334 Pet. 9, 28-29; 03-343 Pet. 9-11) to the court of appeals' decision on the ground that it leaves the detainees without any access to United States courts. In many respects, petitioners' objections echo those of the dissenters in *Eisentrager*, who clearly appreciated "[t]he broad reach of [the Court's] opinion." 339 U.S. at 792 (Black, J., dissenting). In any event, *Eisentrager* does not establish that aliens detained by the military abroad are without any rights or process, but rather that the scope of those rights or procedures are to be determined by the Executive and the military, and not the courts. As the Court stated in *Eisentrager*, "[w]e are not holding that these prisoners have no right which the military authorities are bound to respect," but rather that the "responsibility for observance and enforcement of th[e] rights [asserted on behalf of the prisoners] is upon political and military authorities" in seeking to fulfill the United States' international commitments. *Id.* at

[14] In *Gherebi*, the United States has also argued that the district court lacked jurisdiction to entertain the petition under the terms of the habeas statute because no custodian responsible for the custody of the Guantanamo detainees is present within the Central District of California. See 28 U.S.C. 2241(a); *Schlanger* v. *Seamans*, 401 U.S. 487, 491 (1971) (Under Section 2241, "absence of [the] custodian is fatal to * * * jurisdiction").

789 n.14.[15] Thus, far from establishing the sort of dangerous precedent characterized by petitioners, *Eisentrager* reflects core separation-of-powers principles, avoids the truly dangerous precedent of judicial second-guessing of quintessentially military decisions, and ensures that "enemy litigiousness" does not jeopardize the war effort or "bring aid and comfort to the enemy." *Id.* at 779.

In a similar vein, petitioners argue (03-343 Pet. 25-26) that, under *Eisentrager*, the Guantanamo detainees lack of access to United States *courts* would violate the United States' international obligations. That is incorrect. But more to the point, as this Court recognized in *Eisentrager*, our Constitution reserves that judgment to the political branches, which, unlike the courts, may be held politically accountable for that judgment. See 339 U.S. at 789 n.14. In addition, the federal habeas statute has allowed treaty-based international law claims since at least 1867, and the prisoners in *Eisentrager* themselves raised claims under the Geneva Convention. But in *Eisentrager*, this Court held that the United States courts lacked jurisdiction over such habeas claims. Nor is there any reason to conclude that the same courts that are closed under *Eisentrager* to claims based on an alleged violation of

[15] That political and diplomatic dynamic is fully available and, indeed, already active in the case of the Guantanamo detainees, just as it has been available for aliens detained by the military in connection with prior armed conflicts. See, *e.g.*, Office of the White House Press Secretary, Fact Sheet, *Statement on British Detainees* 1 (July 18, 2003) (discussing meeting between the President and the Prime Minister Blair concerning U.K. nationals detained at Guantanamo) <www.whitehouse.gov/news/releases/2003/07/20030717-9.html>. In addition, in the past year and a half, more than 60 detainees have been released from Guantanamo.

the United States Constitution nonetheless remain open to claims based on alleged violations of international law.

In particular, petitioners' reliance (03-343 Pet. 26-27) on the International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, is misplaced. The ICCPR—a multilateral agreement addressing basic civil and political rights—could not possibly be read to override *Eisentrager*. As Judge Randolph explained in his concurring opinion below, the ICCPR is a non-self-executing treaty that does not create any judicially enforceable rights in this country at all. Pet. App. 22a; see also, *e.g.*, *Flores* v. *Southern Peru Copper Corp.*, No. 02-9008, 2003 WL 22038598, at *18 n.35 (2d Cir. Sept. 2, 2003). Furthermore, by its terms, the ICCPR is inapplicable to conduct by the United States *outside* its sovereign territory. Article 2, paragraph 1 of the ICCPR states that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within* its territory *and* subject to its jurisdiction the rights recognized in the present Covenant" (emphasis added). That territorial limitation is reinforced by the canon of construction that treaties "normally do not have extraterritorial application unless such an intent is clearly manifested." *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

6. There is no reason to hold these petitions pending the disposition of the petition for certiorari in *Sosa* v. *Alvarez- Machain*, No. 03-339 (filed Sept. 2, 2003). As discussed in the United States' brief in support of the petition in No. 03-339, the threshold question presented in *Sosa* is whether the Alien Tort Statute (ATS), 28 U.S.C. 1350, creates a private cause of action for aliens for torts committed in violation of the law of nations or treaties of the United States or, instead, is simply a

jurisdiction-granting provision. In his concurrence in this case, Judge Randolph expounded on the position taken by Judge Bork in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984) (concurring opinion), cert. denied, 470 U.S. 1003 (1985), that the ATS "does not create a cause of action." Pet. App. 20a; see *id.* at 20a-26a. But, as Judge Randolph further observed, it was "unnecessary" for the panel to reach or resolve that ATS issue here because, *inter alia*, "*Eisentrager* disposes of the[se] cases." *Id.* at 26; see *id.* at 19a n.*; see also U.S. Br. at 14-15, *Sosa* v. *Alvarez-Machain*, *supra* (No. 03-339) (discussing *Al Odah*). Accordingly, although Judge Randolph's concurrence sheds added light on the District of Columbia Circuit's interpretation on the ATS, the court of appeals' judgment below does not implicate the important ATS issue presented by *Sosa*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PETER D. KEISLER
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
DAVID B. SALMONS
Assistants to the Solicitor General

DOUGLAS N. LETTER
ROBERT M. LOEB
CATHERINE Y. HANCOCK
Attorneys

OCTOBER 2003

(2) (3)

Nos. 03-334; 03-343; 03-6696

Supreme Court, U.S.
FILED
OCT 3 - 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,
Petitioners,
v.
GEORGE W. BUSH, *et al.*,
Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,
Petitioners,
v.
DONALD RUMSFELD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* HON. JOHN J. GIBBONS, HON. NATHANIEL R. JONES, HON. ABNER J. MIKVA, HON. WILLIAM A. NORRIS, HON. H. LEE SAROKIN, HON. HAROLD R. TYLER, JR., HON. PAUL SIMON, CONRAD K. HARPER, DEBORAH L. RHODE AND JEROME J. SHESTACK IN SUPPORT OF PETITIONERS

DAVID J. BRADFORD
Counsel of Record
STEVEN MCMAHON ZELLER
MATTHEW T. ALBAUGH
WINSTON O. HUFF
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

October 3, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

25 pp

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

These cases involve the limits of the Executive's powers to detain citizens of the United States and citizens of allied countries without charge, without access to counsel, and without any right to challenge the basis for their detention before a United States judge. Amici curiae, former federal judges, former government officials and lawyers, believe that while the questions presented in these three cases may be slightly different, in each case, the Executive has advanced, and the lower courts have accepted, a core position that threatens the role of the judiciary in safeguarding the rule of law in our national government. Therefore, pursuant to this Court's Rule 37.2, amici respectfully submit this brief in support of the petitions for certiorari filed by Petitioners Safiq Rasul, *et al.*, Fawzi Khalid Abdullah Fahad Al Odah, *et al.* and Yaser Esam Hamdi, *et al.*[2]

Hon. John J. Gibbons served as a judge on the United States Court of Appeals for the Third Circuit from 1970 to 1990, and as Chief Judge from 1987 to 1990.

Hon. Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.

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[1] The parties in all three petitions have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, Amici state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than Amici and their counsel contributed monetarily to the preparation or submission of this brief.

[2] Case Numbers 03-334, 03-343 and 03-6696, respectfully. Amici believes that the common threat to the rule of law presented by the actions of the Executive against all Petitioners are appropriately addressed in a single brief for amici who are concerned about the rule of law.

Hon. Abner J. Mikva[3] served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as Chief Judge from 1991 to 1994. He also served as White House Counsel from 1994 to 1995. Prior to taking the bench, he served five terms as a member of Congress, representing portions of Chicago and its suburbs.

Hon. William A. Norris served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

Hon. H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

Hon. Harold R. Tyler, Jr. served as a judge on the United States District Court for the Southern District of New York from 1962 to 1975. He has also served as the Deputy Attorney General of the United States, an Assistant Attorney General of the United States Department of Justice Civil Rights Division, and an Assistant United States Attorney.

Hon. Paul Simon served two terms in the U. S. Senate and six terms in the U.S. House of Representatives, representing Illinois. He is currently a professor of political science and journalism.

Conrad K. Harper, a lawyer in private practice in New York City, served as Legal Adviser of the United States Department of State from 1993 to 1996 and is currently a member of the Permanent Court of Arbitration at The Hague. He has previously been a member of and held

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[3] As a former Judge of the United States Court of Appeals for the District of Columbia Circuit, Judge Mikva abstains from participating as an Amicus in the cases from that Circuit, and joins this Amicus brief only with respect to the *Hamdi* petition for writ of certiorari to the Fourth Circuit.

leadership positions in a range of other bar, human rights and international organizations.

Deborah L. Rhode is the Ernest W. McFarland Professor of Law at the Stanford University School of Law and served as Senior Counsel to Minority Members of the Judiciary Committee of the U.S. House of Representatives in 1998.

Jerome J. Shestack, a lawyer in private practice in Philadelphia, served as president of the American Bar Association and in numerous other leadership positions of the ABA, including as chair of the Section on Individual Rights and Responsibilities.

SUMMARY OF THE ARGUMENT

In *Hamdi*, the Government maintains that the judiciary must accept, conclusively and uncritically, the justification advanced by the Executive for the indefinite detention of a U.S. citizen; in *Al Odah*, the Government maintains that the judiciary may not even inquire as to justifications, since the courthouse door is forever closed to foreign nationals who have not set foot within the "ultimate sovereignty" of the United States. In both cases, the Government's position is misguided, as each case contemplates indefinite Executive detention without adequate process. While the process due will vary with the circumstances, in no event may the Government claim the unfettered power to imprison people indefinitely – that is, unless that power is checked by affording the prisoners the correlative right to the rule of law.

The Petitioners seek judicial review of their indefinite incarceration by the Executive Branch of government. The decisions of the Circuit Courts below disregard one of the most basic and fundamental foundations of our system of government: the rule of law. In addition, the

courts below, in granting unprecedented deference to the decisions and statements of the Executive Branch, have ignored the responsibilities of the judiciary fairly and adequately to review those decisions when faced with a *habeas corpus* petition.

Amici recognize the paramount importance of our national safety. Amici also share the strong desire that our Government enjoy the necessary power and flexibility to prevent future terrorist attacks. But Amici respectfully suggest that the Due Process Clause is not an enemy of those efforts. Rather, it is an integral part of the values and liberty that this nation holds dear. Amici respectfully suggest that we should not forsake this defining heritage.

Section I of this amicus brief demonstrates that the Courts of Appeals' decisions are contrary to the rule of law and ignore the purposes of the Great Writ in protecting the rule of law. Section II demonstrates that providing petitioners with due process will not interfere with legitimate military interests. Section III demonstrates that, contrary to the decision in *Al Odah*, no policy or precedent warrants denying basic due process rights to citizens of friendly nations imprisoned by and in a territory under the exclusive jurisdiction and control of the United States.

ARGUMENT

I. THE DECISIONS OF THE COURTS BELOW ARE CONTRARY TO THE RULE OF LAW AND IGNORE THE PURPOSES OF THE GREAT WRIT IN PROTECTING THE RULE OF LAW

It is fundamental that the government may not take the life, liberty or property of a person without authority from the law itself. This fundamental precept is one of the cornerstones of our democracy. The Courts of

Appeals' decisions below have ignored the important role that the rule of law must play in times of crisis as well as peace.

A. The Decisions Below Are Contrary to the Rule of Law

The rule of law broadly encompasses both "procedural and substantive" limitations on government power. Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 457 (2003). It is generally agreed that the rule of law requires: 1) the supremacy of legal authority over officials as well as ordinary citizens; and 2) the availability of the courts to enforce the law and employ fair procedures. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 (1997). When officials act to deprive individuals of liberty without legal authority and seek to deny the availability of the courts to review their actions, the rule of law is violated.

Petitioners in these cases have been subjected to indefinite detention by the Executive, under conditions created by the Executive and will most likely not face any sort of judgment regarding their continued detention. This consolidation of power is antithetical to the rule of law. Our system is a system of checks and balances. *Nixon v. United States*, 506 U.S. 224, 234-35 (1993). Our Founders warned against these circumstances in advocating for the adoption of our Constitution: "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47 (James Madison).

It has been a hallmark of Anglo-American legal tradition that an independent and impartial judiciary be

available to protect against abuses of power carried out by the Executive. The guarantee that no man should be deprived of his liberty or property without review by the judiciary was extracted from King John and enshrined in the Magna Carta. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

Courts must also remain faithful to the rule of law, particularly when the popular political will calls for its elimination. In a case related to the treason trial of former Vice-President Aaron Burr, Chief Justice Marshall recognized that circumstances in which popular passions are high required more from the judiciary: "[a]s there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807) (Marshall, C.J.).

The rule of law demands that the judicial process function in both times of crises and times of calm. Chief Judge Cranch's words in *United States v. Bollman*, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622), provide guidance in these proceedings:

> [i]n times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the

> duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude. Whenever an application is made to us in our judicial character, we are bound, not only by the nature of our office, but by our solemn oaths, to administer justice, according to the laws and constitution of the United States. No political motives, no reasons of state, can justify a disregard of that solemn injunction. In cases of emergency it is for the executive department of the government to act upon its own responsibility, and to rely upon the necessity of the case for its justification; but this court is bound by the law and the constitution in all events.

Bollman, 24 F. Cas. at 1192 (Cranch, C.J., dissenting).

Courts are entrusted with the duty of upholding the rule of law in the face of political or popular attempts to erode it. As Justice Harlan stated: "[i]t will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution." *Downes v. Bidwell*, 182 U.S. 244, 382 (1901) (Harlan, J., dissenting). The detention of the Petitioners should be subjected to plenary review by this Court to ensure that the rule of law and our system of checks and balances prevail.

B. The Writ of Habeas Corpus Provides Petitioners with Judicial Review of Executive Branch Detentions

The writ of habeas corpus is a fundamental right critical to ensuring access to the rule of law. As Blackstone explained, the writ requires the government to furnish to a court a legal basis for its decision to deprive an individual of liberty:

> the glory of the English law consists in clearly defining the times, the causes, and the extent when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *133. The objective of the writ "is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.). The writ upholds the rule of law "since it is the appropriate remedy to ascertain whether any person is rightfully in confinement or not." Joseph Story, *Commentaries on the Constitution of the United States* § 1333 (1833).

It is undisputed that the writ applies to persons who have been detained pursuant to the orders of the Executive Branch. In fact, a more searching inquiry is appropriate in a habeas proceeding challenging the actions of Executive officials than when habeas is invoked as a remedy for post-conviction relief. *See Developments in the Law -- Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1238 (1970) ("While habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.").

The Framers of our Constitution specifically limited the situations in which the writ could be curtailed. *See*, U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). The Framers only provided the legislature with the power to suspend the writ. This ensured that an Executive with the power indefinitely to detain, could not on his own deprive the detained individual from having the detention examined by court. Past attempts by the Executive Branch to suspend the writ have met with judicial resistance. *Ex parte Merryman*, 17 F. Cas. 144, 148 (Cir. Ct. Md. 1861) (No. 9,487) (Taney, C.J.) ("I can

see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus . . . ."). The Legislative Branch has not suspended the writ. This Court should not countenance a *de facto* suspension by the Executive Branch.

II. PROVIDING PETITIONERS DUE PROCESS WILL NOT INTERFERE WITH LEGITIMATE MILITARY INTERESTS

The Executive asserts that undefined and amorphous exigencies of military conflict warrant the creation of a black hole in which the rule of law has limited, if any, application.

The Executive's argument ignores the time honored principle , forged in the heat of prior armed conflicts, that combat does not eviscerate the Constitution. "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring).

The Constitution is applied "equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866); *accord United States v. Robel*, 389 U.S. 258, 263-64 (1967). Courts and their procedural safeguards were established by our founders to protect civil liberties. *Ex parte Quirin*, 317 U.S. 1, 19 (1942). The founders were categorically opposed to a system of government that would place in the hands of one man the power to make, interpret and enforce the laws.

Amici do not dispute that federal courts should afford deference to the Executive in matters related to the

military and the conduct of the national defense. However, this deference is not unlimited. It diminishes by the degree to which the conduct at issue is remote from the threat alleged by the Executive to justify its actions; "[a]s necessity creates the rule, so it limits its duration." *Ex parte Milligan*, 71 U.S. at 121-22 (finding military trial of a citizen to be unconstitutional in a state whose courts were open, "needed no bayonets to protect it, and required no military aid to execute its judgments"); *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946).

The right to habeas corpus review is intended to check both military and civilian authority. James Madison stated that "unless these [military and civilian] departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." THE FEDERALIST NO. 48 (James Madison); *see also Parisi v. Davidson*, 405 U.S. 34, 49 (1972) ("One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds.")

Courts that have addressed habeas corpus petitions in similar contexts have consistently expressed little reticence to exercise judicial review. Justice Story cautioned that the President during war "has a discretion vested in him . . . but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims." *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting).

Later, in *Sterling v. Constantin*, 287 U.S. 378 (1932), the Court affirmed that the line between permissible

discretion and law is one that must be drawn by the judiciary:

> [i]t does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the . . . [Executive] may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, . . . is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken . . . [but] the officer may show the necessity in defending an action [before the judiciary].

Id. at 400-01.

Further, in *Ex parte Quirin*, the Court rejected the notion that the Government's classification of the petitioners foreclosed their ability to challenge the legality of their detention in federal court:

> [t]he Government challenges each of [petitioner's] propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our country as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class by persons defined by the

> Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force, no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.

Ex parte Quirin, 317 U.S. at 24-25. The Court continued by stating that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy . . . individuals." *Id.* at 25.

Still further, the Court in *Youngstown Sheet & Tube Co. v. Sawyer* confirmed that the Founders purposefully failed constitutionally to grant the president unreviewable powers to be used as necessary in times of emergency. 343 U.S. at 588. Allowing the Executive Branch to operate under such a broad mandate would in effect make the president a monarch during times of crisis. Justice Jackson, in his concurrence, emphasized that the only way to ensure a free government is to require the Executive to be under the law. *Id.* at 655 (J. Jackson, concurring); *see also United States v. Lee*, 106 U.S. 196, 219 (1882) ("[T]he Constitution creates no executive prerogative to dispose of the liberty of the individual."); *Korematsu v. United States*, 584 F. Supp.

1406, 1420 (N.D. Cal. 1984) ("[T]he shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.").

This Court should thus continue a consistent legacy in providing due process to the Petitioners irrespective of a military conflict abroad.

III. NO POLICY OR PRECEDENT WARRANTS DENYING BASIC DUE PROCESS RIGHTS TO CITIZENS OF FRIENDLY NATIONS IMPRISONED BY AND IN A TERRITORY UNDER THE EXCLUSIVE JURISDICTION AND CONTROL OF THE UNITED STATES

The Court of Appeals' decision in *Al Odah* permits the Government to detain indefinitely certain Petitioners without a forum to dispute the legality of their detention and without access to even the most basic of due process rights. *Al Odah v. United States* 321 F.3d 1134, 1141 (D.C. Cir. 2003) ("The consequence is that no court in this country has jurisdiction to grant habeas relief."). The decision is based upon the premise that Petitioners have not technically set foot within the "ultimate sovereignty" of the United States, although the Petitioners are purposely[4] imprisoned just ninety miles south of the Florida border at Guantanamo Bay, a territory under the exclusive control and jurisdiction of the United States. As justification for the withholding of all constitutional rights to Petitioners, the Government argues the

[4] American College of Trial Lawyers, *Report on Military Commissions for the Trial of Terrorists* 8 (Mar. 2003) ("[T]he placement of the detainees at Guantanamo, w[as] carefully designed to evade judicial scrutiny and to test the limits of the President's constitutional authority.").

"ultimate sovereignty" over Guantanamo Bay rests with Cuba.

Yet no compelling policy or precedent exists for such a holding. The court below misread and over-extended relevant precedent, failed to reconcile decisions involving other territories over which the United States has jurisdiction and control, afforded the Executive unchecked and unreviewable authority over nonresident aliens of friendly nations and failed to recognize the flexible application of the Due Process Clause.

A. The Court of Appeals' Decision Extends *Johnson* Beyond Its Proper Holding and Fails to Reconcile Conflicting Opinions Affording Rights to Nonresident Aliens in Territories Outside the "Ultimate Sovereignty" of the United States

The Court of Appeals' decision in *Al Odah* relies heavily upon a strained reading of this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the Court held that German war criminals convicted and sentenced by a lawful military commission for violating the law of war in China could not seek habeas relief in the federal courts. Application of *Johnson* to Petitioners' cases is inappropriate because Petitioners here are neither convicted war criminals nor enemy aliens. Rather, they are citizens of nations friendly to our Government. And, unlike *Johnson*, Petitioners here are being held in a territory under the exclusive possession and control of the United States government.

The Courts of Appeals tied the federal court's jurisdiction to an artificial "ultimate sovereignty" test. In doing so, they elevated form over substance. Although the United States alone exercises power, control and jurisdiction over Guantanamo Bay and refuses to

recognize the authority of any international tribunal or foreign court, Cuba retains titular "ultimate sovereignty" over the land. In Guantanamo Bay, the United States has all "the basic attributes of full territorial sovereignty." *Duro v. Reina*, 495 U.S. 676, 685 (1990). This includes "the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Id.*

The decision in *Al Odah* also conflicts with a long line of decisions relying upon this Court's decision in the *Insular Cases*, a series of cases from *Delima v. Bidwell*, 182 U.S. 1 (1901), to *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Various courts have afforded the protection of fundamental constitutional rights to residents, aliens and citizens of similar territories, where the United States exercises control and jurisdiction but does not have ultimate sovereignty. *See, e.g., United States v. Husband R. (Roach)*, 453 F.2d 1054, 1057-61 (5th Cir. 1971) (holding the Due Process Clause is applicable to government action taken against an alien in Panama Canal zone, an area leased by the United States); *Juda v. United States*, 6 Cl. Ct. 441, 458 (1984) (finding Takings Clause applicable to both aliens and citizens of Marshall Islands and holding that "[a]ll of the restraints of the Bill of Rights are applicable to the United States wherever it has acted"); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977) (holding fundamental constitutional rights applicable to non-resident of Trust Territory of the Pacific Islands, a territory under the complete control and jurisdiction, but not ultimate sovereignty, of the United States); *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) (extending constitutional rights to non-resident aliens within American sector of Berlin, Germany).

Here, the Court of Appeals' decision encourages manipulation of the legal process and strips the courts of

jurisdiction under the guise of deferring to Cuba's ultimate, but unexercised, sovereignty.

B. The Court Should Accept Certiorari to Uphold the Judiciary's Power to Review the Unilateral Actions of the Executive Branch and to Recognize the Flexible Application of the Due Process Clause

By concluding that it was without authority to determine what process, if any, is due to Petitioners, the Court of Appeals in *Al Odah* also ignored the enormous practical flexibility which the Due Process Clause permits in its application. The Due Process Clause requires only such process as is due under the circumstances. *See Heller v. Doe*, 509 U.S. 312, 332 (1993) ("[F]lexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.") (quoting *Greenholtz v. Inmates of Nev. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979)); *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (holding the process required depends on the balance of interests at stake).

Such flexibility ensures that the threshold determination – whether the Due Process Clause applies – will not compel imprudent results in circumstances involving national security.[5] Territorial considerations or the citizenship of the persons seeking due process alone should not be an exclusive basis for avoiding the provision of due process altogether. Rather, the key

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[5] The rule of law promises that "there exists a fair, rational, process through which one can protect one's interest." James W. Torke, *What Is This Thing Called the Rule of Law?*, 34 IND. L. REV. 1445, 1447 (2001).

determination depends on the process rightfully due under the circumstances:

> [t]he proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place . . . [T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.

Reid v. Covert, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring) (emphasis in original). In the present case, where the Government actively denies Petitioners all liberty rights whatsoever, the "particular circumstances" cry out for the extension of at least the most basic of due process rights, including the right fairly to contest the legitimacy of their detention. The Government has denied Petitioners all basic due process rights for over eighteen months, and it argues that this Court should condone this limbo for an indefinite period.

In addition, the decision of the Court of Appeals ignores that the Government has alternatives for dealing with circumstances of war. It may treat detainees as prisoners of war. It may prosecute them under procedures specifically designed to safeguard national security. *See United States v. Bin Laden,* No. 98-Cr-1023, 2001 U.S. Dist. LEXIS 719 (S.D.N.Y. Jan. 25, 2001) (limiting access to confidential information). Each of these courses may permit detentions that are fully consistent with the rule of law. Instead, the Government has created an unprecedented alternative – a territory where it may indefinitely imprison citizens of friendly

nations without any compliance with the Geneva Conventions or any other rule of law of any kind. The notion that it is necessary to embrace lawlessness in order to defend liberty denigrates the practical wisdom of our founders in creating a tripartite sharing of authority, crafting a flexible Due Process Clause and affording Congress – not the Executive -- the authority to suspend the Great Writ.

The decisions below effectively provide our Executive unbridled authority in dealings with foreign citizens whom it imprisons in light of the tragic events of September 11, 2001. But unbridled, unchecked authority to any Executive, no matter how well-intentioned, runs counter to our system of law.

CONCLUSION

For the foregoing reasons, the petitions should be granted.

Respectfully Submitted,

David J. Bradford
Counsel of Record
Steven McMahon Zeller
Matthew T. Albaugh
Winston O. Huff
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Counsel for Amici Curiae

Dated: October 3, 2003

Supreme Court, U.S.
FILED
OCT 3 2003
OFFICE OF THE CLERK

(3) (4)

Nos. 03-334 and 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL ET AL.,

Petitioners,

v.

GEORGE W. BUSH ET AL.,

Respondent.

FAWZI KHALID ABDULLAH FAHAD AL ODAH ET AL.,

Petitioners,

v.

UNITED STATES ET AL.,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE COMMONWEALTH LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS

SIR SYDNEY KENTRIDGE, Q.C.
Brick Court Chambers
7-8 Essex Street
London WC2R 3LD
44 207 379 3550

STEPHEN J. POLLAK*
JOHN TOWNSEND RICH
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

COLIN NICHOLLS, Q.C.
3 Raymond Buildings
London WC1R 5BH
44 207 400 6400

TIMOTHY OTTY, BARRISTER
20 Essex Street
London WC2R 3AL
44 207 842 1200

Attorneys for the Commonwealth Lawyers Association

October 3, 2003

**Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF THE *AMICUS CURIAE*[1]

The *amicus*, the Commonwealth Lawyers Association ("the CLA") is a body dedicated to the rule of law throughout the Commonwealth.[2] All Law Societies and Bar Associations of the fifty-four countries comprising the Commonwealth are institutional members of the CLA.

Three signatories to this brief are practicing members of the English Bar. Colin Nicholls, Q.C., is the President of the CLA, and he has signed the brief with the full authority of the Council of the CLA.

The Petitioners who are seeking to appeal the judgment of the United States Court of Appeals for the District of Columbia include two citizens of the United Kingdom and two citizens of Australia, member states of the Commonwealth.[3] Other Petitioners are nationals of Kuwait, a state which like the United Kingdom and Australia is friendly to the United States.[4]

This brief is submitted in support of the Petitioners, but the CLA wishes to make it clear at the outset that it does not presume to examine or comment on the judgment of the Court of Appeals in this case or the judgment of this Court in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950). The main purpose of this brief is to explain the basis on which the courts of the United Kingdom exercise jurisdiction in habeas corpus. We hope this may assist this Court for the following reasons:

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[1]No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and its legal counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk.

[2]The Commonwealth is a voluntary association of fifty-four independent sovereign states. Its 1.7 billion people account for 30 per cent of the world's population.

[3]Pet. in No. 03-334 at 2.

[4]Pet. in No. 03-343 at 1.

a) the writ of habeas corpus has its origin in England;
b) in *Johnson* v. *Eisentrager* the Supreme Court referred to the English origins of habeas corpus and the harmony between the relevant laws of the two jurisdictions;[5]
c) because of Britain's history as an imperial power, issues of territorial jurisdiction in habeas corpus have not infrequently arisen in the High Court in England in relation to territories outside the United Kingdom, including territories over which the United Kingdom did not assert sovereignty but, over which, through its own executive officers, it exercised power and control.

SUMMARY OF THE ARGUMENT

In the English courts neither the nationality of the detained person, nor the existence of sovereignty in the detaining state over the territory in which the person is detained, will determine the availability of the writ of habeas corpus. The determining factors are, rather, whether the respondent to the writ possesses the actual power of detention or release, whether that respondent is subject to the jurisdiction of the court and (in the case of distant territories) whether there is a local court with power to grant the remedy.

Accordingly, subject to the assumptions that—

a) the Petitioners are not enemy aliens;[6]

[5]339 U.S. at 779. See also *Fay* v. *Noia*, 372 U.S. 391, 399–400 (1963), where the Court, per Brennan J., spoke of the "extraordinary prestige of the Great Writ" in Anglo-American jurisprudence and also its "Anglo-American" development and also stated (at 401): "It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today."

[6]*I.e.*, citizens of a state at war with the United States. See *Johnson* v. *Eisentrager*, 339 U.S. at 769 n.2.

b) they are not admitted or clearly shown to be prisoners of war in terms of the Geneva Convention (III) Relative to the Treatment of Prisoners of War;[7]
c) there is no court in Guantanamo Bay with power to grant and enforce the writ of habeas corpus;

if it were the United Kingdom and not the United States which controlled the Guantanamo Bay Naval Base and held the Petitioners in detention on the same basis and with the same powers as does the United States, English courts having jurisdiction over the Respondents would assume jurisdiction to issue writs of *habeas corpus*, whatever the nationality of the Petitioners. We believe that the same position would also apply before Commonwealth courts were any other Commonwealth state to be in control of the Guantanamo Bay Naval Base.

We emphasise that this is not to say that an English or Commonwealth court would necessarily set the Petitioners at liberty. But it would, on the return to the writ, examine their status and the circumstances of their detention, and determine whether their detention was justified.

ARGUMENT

I. The origins and history of the writ of habeas corpus illustrate the importance of the writ and the breadth of protection it affords.

The origins of the writ of habeas corpus in England and the Commonwealth may be found in *Magna Carta*. Article 1 of *Magna Carta* states that all the freedoms set out therein were "given to all the free-men of our realm, for us and our Heirs for ever," and Article 29 provides that "no Freeman shall be taken, or imprisoned, or be dispossessed of his Freehold, or

[7]This convention provides its own remedies for persons held as prisoners of war, but who dispute that classification. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Pet. in No. 03-334 at 69a, 70a).

Liberties, or free Customs, or be outlawed or exiled, * * *but by lawful Judgment of his Peers, or by the Law of the Land."[8] A Divisional Court of the Queen's Bench has recently endorsed the following statement as accurately reflecting its present day significance in English law:

> "[*Magna Carta*] becomes and rightly becomes a sacred text, the nearest approach to an irrepealable 'fundamental statute' that England has ever had. * * * For in brief it means this, that the king is and shall be below the law."[9]

It appears that it was in the sixteenth century that the writ of habeas corpus first began to be used as a means of testing the validity of executive committals.[10]

In 1640 the English Parliament made its first express attempt to curtail the power of executive detention. Section VIII of the Habeas Corpus Act of 1640, 16 Car. 1, c. 10, provided that "any Person" imprisoned by order of the King or Council should have habeas corpus and be brought before the court without delay with the cause of imprisonment shown. The Act was passed against the background of the first case of major constitutional importance to address the question of habeas corpus, *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627).[11]

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[8]*Magna Carta* arts. 1 & 29, 1 Stat. at Large (Runnington rev. to Ruffhead ed., London, Charles Eyre *et al.* 1786).

[9]1 Frederick Pollock & Frederic W. Maitland, The History of English Law 173 (2d ed. 1923), cited and quoted with approval by Lord Justice Laws in *Regina (Bancoult)* v. *Sec'y of State for Foreign and Commonwealth Affairs*, [2001] Q.B. 1067, 1095 (Q.B.D. Admin. Ct.).

[10]R.J. Sharpe says in the leading textbook on the subject, The Law of Habeas Corpus 7 (2d ed. 1989): "By the time of Elizabeth [I], it was becoming clear that the claim to a power to commit for reasons of state could be tested on habeas corpus. There are cases as early as 1567 in which habeas corpus was used by persons detained by order of the Privy Council to obtain their release on bail."

[11]In *Darnel's Case*, the King, Charles I, had imprisoned five Knights as a result of their refusal to contribute to the repayment of a forced loan he had taken out. The Knights sought their freedom by issue of writs of habeas corpus and, in response, the King simply asserted (at 33) that they had been detained "*per speciale mandatum domini regis*." The issue in the case was whether the Court was required to assume that there was substantive legal justification for the imprisonment or whether the failure to disclose specific grounds entitled the prisoners to be bailed pending trial. The Court ruled in favour of the King and refused to bail the Knights. The Habeas Corpus Act of 1640 in effect reversed that decision.

Although now repealed, the Act's wording is notable in that it attributes no significance to either the location of the detained person or his nationality. The right arose purely by virtue of the detention by the King or Council.

In 1679 a second Habeas Corpus Act, 31 Car. 2, c. 2, made it clear that the territorial scope of the protection afforded by habeas corpus—the guarantee against arbitrary detention—was intended to be broad. The preamble described the Act as "An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas," and Section XII made it an offence to remove detained persons to places where the writ could not be served.

The Habeas Corpus Act of 1816, 56 Geo. 3, c. 100, specified that non-obedience to the writ of habeas corpus was a contempt of court and empowered the court to inquire into the truth of facts averred in the return to the writ and, in cases of doubt as to their accuracy, to grant the detained person bail.[12]

Over the centuries English judges and lawyers have emphasized the importance of the writ of habeas corpus and its

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[12]Another Act passed in 1816 also owed its origins to the law of habeas corpus. It was entitled "An Act for the more effectually detaining in Custody *Napoleon Buonaparté*," 56 Geo. 3, c. 22 (1816) (Eng.), and was passed specifically to render lawful the continued detention of Bonaparte notwithstanding the end of the Napoleonic wars by deeming him to be a "Prisoner of War" and so to have no right to habeas corpus. See 1 Arnold Duncan, Lord McNair, International Law Opinions 104–07 (1956), explaining the origins of the Act and how Admiral Lord Keith (the commander in chief of the English Channel fleet) had been "'chased all day by a lawyer with a *Habeas Corpus*!'" The 1862 Habeas Corpus Act is also of significance and is referred to in more detail below.

fundamental purpose—namely to provide a speedy and effective means to test the lawfulness of any detention and thus to protect the liberty of the individual. The jurisdiction of the High Court in England to grant the writ was recognized as extending to any part of the King's dominions. Blackstone described the writ thus:

> "[T]he great and efficacious writ in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; * * *. This is a high prerogative writ, * * * running into all parts of the king's dominions: for the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."[13]

The breadth of the remedy was re-affirmed in the House of Lords by the Earl of Birkenhead in *Sec'y of State for Home Affairs* v. *O'Brien*, [1923] A.C. 603 (appeal taken from Eng.), when he said the following (at 609):

> "We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law. The writ with which we are concerned to-day was more fully known as habeas corpus ad subjiciendum. * * * It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege."

[13]3 William Blackstone, Commentaries *131.

II. As a matter of English law the writ of habeas corpus will not be refused to any person within the jurisdiction of the Crown solely on the ground that he or she is an alien.

Innumerable judicial statements to the same effect as that made by the Earl of Birkenhead could be cited. In some of them the right to liberty which is protected by the writ has been described as a right of "the subject," "the liege," or "the citizen." It has, however, long been accepted that the remedy is equally available to aliens.[14] In the case of *Khera* v. *Sec'y of State for the Home Dep't* and *Khawaja* v. *Sec'y of State for the Home Dep't*, [1984] A.C. 74 (appeal taken from Eng.), the applicant for habeas corpus was a Pakistan national held in the United Kingdom pending his removal pursuant to an order made by an immigration officer. In the course of his judgment (with which, on this point, none of the other members of the House of Lords disagreed) Lord Scarman stated that the question of a detained person's nationality was irrelevant to his right to the writ of habeas corpus. He said (at 111–12):

> "Habeas corpus protection is often expressed as limited to 'British subjects.' Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the black' in *Sommersett's Case* (1772) 20 St. Tr. 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed."

[14]Other than enemy aliens (as defined above, see *supra* note 6) and prisoners of war to whom different considerations have been held to apply.

Other cases illustrating the irrelevance of nationality in habeas corpus are referred to below. The signatories to this brief know of no English or Commonwealth case where the writ has been refused to any person within the jurisdiction of the Crown solely on the ground that he or she is an alien.

III. The writ of habeas corpus is a flexible remedy adaptable to changing circumstances.

Consistent with its underlying purpose the writ of habeas corpus has always been treated as a flexible remedy. In the context of the Court's powers to issue the writ to prevent removal of a foreign immigrant seeking to challenge deportation, Lord Justice Taylor (later the Lord Chief Justice of England and Wales) observed in *Regina* v. *Sec'y of State for the Home Dep't, ex parte Muboyayi*, [1992] Q.B. 244, 269 (C.A.):

> "The court must inherently have the power to prevent its decision from being pre-empted by administrative action. The great writ of habeas corpus has over the centuries been a flexible remedy adaptable to changing circumstances."

IV. As a matter of English law jurisdiction for the purposes of the writ of habeas corpus is established when the detained person is placed under the control of the Crown or enters territory under the Crown's control whether or not the Crown claims sovereignty over that territory.

In the passage from the *Khawaja* decision quoted above Lord Scarman said that the writ was available to "[e]very person within the jurisdiction." Although the *Khawaja* case related to an individual within the United Kingdom, the central question, as Lord Scarman indicated, was whether the individual seeking to invoke the remedy of habeas corpus could be said to be "within the jurisdiction" of the United Kingdom. As a matter of English law "jurisdiction" in this context is established when the individual is placed under the control of the Crown or enters territory under the Crown's control. What is determinative in habeas corpus jurisdiction is whether the officers of state to whom the writ is directed have effective control over the detained person, and whether those officers are themselves subject to the jurisdiction of the court. If the United Kingdom Parliament has assumed power to make laws applicable to a particular territory and if the United Kingdom executive has applied and enforced United Kingdom law there, then there is no doubt that that territory would be regarded as being within United Kingdom jurisdiction. See, *e.g.*, *The King* v. *The Earl of Crewe, ex parte Sekgome*, [1910] 2 K.B. 576, 606 (C.A.), per Vaughan Williams, L.J., discussed *infra*.

That the English courts in exercising this jurisdiction have looked to actual control over territory and not to concepts of legal sovereignty is evidenced by a line of cases extending over two and a half centuries. We refer to the principal cases below.

***Rex* v. *Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B. 1759):**

The issue in this case was whether the writ of habeas corpus could issue to Berwick which had been acquired by conquest from Scotland, but not formally incorporated within England, and which remained governed by its own charter. Lord Mansfield, Chief Justice, giving the judgment of the Court did not find it necessary to determine the precise legal status of Berwick. He held that:

> "Writs * * * such as * * * habeas corpus * * * are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England. [¶] There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England* * *." 2 Burr. at 855–56.

"Dominion" in 1759 had no technical meaning. Nor was "subjection" in this context a technical term. It implied no more than actual control and power. In *Ex parte Mwenya*, [1960] 1 Q.B. 241, 310 (C.A.), (to which we shall return in more detail below), Lord Justice Sellers said of this statement of Lord Mansfield:

> "Lord Mansfield gave the writ the greatest breadth of application which in the then circumstances could well be conceived. * * * 'Subjection' is fully appropriate to the powers exercised or exercisable by this country irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the Crown in the place concerned."

***Ex parte Anderson*, 3 El. & El. 487, 121 Eng. Rep. 525, 30 L.J.Q.B. 129 (Q.B. 1861):**

In this case the English High Court issued a writ to the sheriff of the County of York in Canada, and to the keeper of the gaol of Toronto in that county, to bring up the body of an American slave, John Anderson. In granting the writ Chief Justice Cockburn acknowledged that the colony had both legislative and judicial independence, but continued as follows:

> "Nevertheless, it is to be observed that, in establishing a local judicature in Canada, our Legislature has not gone so far as expressly to abrogate the right of the superior Courts at Westminster to issue the writ of habeas corpus to that province * * *. [W]rits of habeas corpus have been and may be issued into all parts of the dominions of the Crown of England, wherever a subject of the Crown is illegally imprisoned or kept in custody. * * * [A]nd as the writ has issued even into dominions of the Crown in which there is an independent local judicature; we think that nothing short of legislative enactment would justify us in refusing to exercise the jurisdiction, when called upon to do so for the protection of the personal liberty of the subject." 3 El. & El. at 527–28.

This decision illustrated the broad territorial scope of the writ of habeas corpus. Moreover, as Anderson was an American slave, it is evident that the use of the term "subject" was not equated with the status of citizenship.

The Habeas Corpus Act of 1862 was passed in response to the controversy created by the decision in *Ex parte Anderson*. It was described by its preamble as "An Act respecting the Issue of Writs of Habeas Corpus out of *England* into Her Majesty's Possessions Abroad." Section 1 provided that:

> "No Writ of Habeas Corpus shall issue out of *England*, by Authority of any Judge or Court of Justice therein, into any Colony or Foreign Dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having Authority to grant and issue the said Writ, and to ensure the due Execution thereof throughout such Colony or Dominion."

The Act makes it clear that if the local courts in a British colony or "Foreign Dominion" could not effectively issue and enforce the writ, the High Court in England retained the power to do so, emphasising the Crown's broad jurisdiction over habeas corpus and recognizing the fundamental need for at least one court to exist that can "ensure the due Execution" of the writ in any place under British control.

***The King* v. *The Earl of Crewe, ex parte Sekgome*, [1910] 2 K.B. 576 (C.A.):**

This case related to the English Court's jurisdiction to issue a writ of habeas corpus to the Protectorate of Bechuanaland. The Protectorate was not part of the Crown's dominions[15] nor

[15]See [1910] 2 K.B. at 591–92, per Vaughan Williams, L.J., and at 622–23, per Kennedy, L.J. The relevance of this term arises from the Habeas Corpus Act, 1862, to which we have referred above.

did the British Government assert sovereignty over it. It did, however, control and administer the territory. On the evidence of the Secretary of State for the Colonies it was merely a "foreign country within which [the Crown] had power and jurisdiction by treaty, grant, usage, sufferance, or other lawful means * * * [and] that it had never been acquired by settlement, or ceded to, or conquered, or annexed by His Majesty or any of his Royal predecessors * * *."[16] The writ was sought on behalf of an individual who claimed to be the chief of a native tribe but nevertheless a British subject. Counsel for the Respondent—the Secretary of State for the Colonies—conceded that it was immaterial whether or not the applicant was a British subject.[17] The Court nevertheless considered that concession to have been well-founded and to accurately represent the law.[18] Moreover, the majority (Lord Justice Vaughan Williams and Lord Justice Farwell) held that the writ ran to the Protectorate, notwithstanding that it was not a British colony or dominion.[19]

Lord Justice Vaughan Williams indicated that it was the fact of presence in territory under the control of the State and the assertion of power over the individual by the State which triggered the protection of the writ and neither sovereignty nor nationality-based ties to that State. He said (at 592) that "the writ may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner." Later he added (at 606):

> "In the present case the King has every means of enforcing obedience. The Crown * * * has established laws which the dwellers in the Protectorate, whether natives or mere residents, must obey, and from which they surely

[16]See [1910] 2 K.B. at 577.

[17]See *id.* at 580.

[18]See, *e.g.*, *id.* at 606, per Vaughan Williams, L.J., and at 620, per Kennedy, L.J.

[19]Kennedy, L.J., dissented on this point.

> must be entitled to receive protection when injured. Is the mere fact of absence of annexation and theoretical possession to deprive the Crown and those who are under the law from the benefits and power of the writ of habeas?"

Lord Justice Farwell also indicated (at 618) that he considered the crucial issue to be control on the part of the proposed Respondent rather than the precise legal status of the territory where the applicant was detained.

Lord Justice Kennedy (who in fact rejected the availability of the writ on different grounds[20]) stated, in terms, that he considered that the question as to whether or not the applicant was a British subject was an irrelevance, and that the key issue was whether or not he was detained under British authority. He said:

> "In my opinion the mere fact that a person in detention ought to be considered as not being in the strict sense of the term a British subject could not in itself be treated as impairing the jurisdiction of the High Court of Justice to direct the issue of the writ, if it were shewn that his custodian was detaining him within a British dominion and claiming so to detain him in the exercise of powers conferred upon him by British jurisdiction. The remedy obtainable by the writ of habeas corpus is not confined to British subjects. * * * [If] Gaberones, where Sekgome is detained, can rightly be held to be within the foreign dominions of the Crown, I do not think that the jurisdiction of the High Court of Justice to issue the writ of habeas corpus could be affected in any way by the fact that Sekgome is not a British subject." *Id.* at 620–21.

[20]In Lord Justice Kennedy's view, the writ could not be issued beyond territories which were formally "dominions" of the Crown but in this respect he was alone—Lord Justice Vaughan Williams and Lord Justice Farwell stating that they preferred the opposite conclusion. See *id.* at 624; cf. *id.* at 592, 605–06, per Vaughan Williams, L.J., & 618, per Farwell, L.J.

***The King* v. *Sec'y of State for Home Affairs, ex parte O'Brien*, [1923] 2 K.B. 361 (C.A.):**

In this case the applicant, O'Brien, was said to be a ringleader of an illegal organization which had as its purpose the overthrow of the Governments in Southern and Northern Ireland and the commission of acts of violence in England. O'Brien was arrested in London and sent by the British authorities to Mountjoy Prison in Dublin in the Irish Free State where he was detained. The Irish Free State was then a self-governing British Dominion with its own parliament and executive. O'Brien applied to the High Court in London for a writ of habeas corpus. The writ was refused by the Divisional Court but granted by the Court of Appeal. Notwithstanding the fact that the Respondent—the Secretary of State—had lost legal control over O'Brien by handing him over to the Irish Free State Government it held that there was sufficient doubt whether the Secretary of State nonetheless retained de facto control to justify the issue of the writ so that the question of control might be definitively determined on the return. Lord Justice Atkin summarized the matter in the following passage (at 397–98):

> "Having come to the definite conclusion that the order made by the Home Secretary is invalid and that the imprisonment of the applicant thereunder is unlawful, it only remains to consider whether the writ should go to the Home Secretary. I think that the question is whether there is evidence that the Home Secretary has the custody or control of the applicant. Actual physical custody is obviously not essential. 'Custody' or 'control' are the phrases used passim in the opinions of the Lords in *Barnardo* v. *Ford* [[1892] A.C. 326)], and in my opinion are a correct measure of liability to the writ. * * *. In testing the validity of the order [of detention] the question is as to the legal right to control; in testing the liability of the respondent to the writ the question is as to de facto control. In all cases of alleged unjustifiable detention such as arise on applications for the writ of habeas corpus the custody or control is ex hypothesi unlawful; the question is whether it exists in fact."[21]

***Ex parte Mwenya*, [1960] 1 Q.B. 241 (C.A.):**

This case concerned the jurisdiction of the High Court in England to issue a writ of habeas corpus to the Protectorate of Northern Rhodesia. Like Bechuanaland in Sekgome's case Northern Rhodesia was described as a "'foreign country within which Her Majesty has power and jurisdiction by treaty, grant, usage, sufferance and other lawful means,'"[22] and where, for the purposes of the argument, it was assumed that there was no court in Northern Rhodesia competent to give equivalent relief.[23] The Crown submitted that the only test for the availability of the writ was one of territorial sovereignty[24] and that that test was failed on the facts of the case. Each

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[21]See also [1923] 2 K.B. at 381, per Lord Justice Bankes, and at 391–92, per Lord Justice Scrutton. Most English lawyers would agree that that these three Lord Justices constituted the most powerful English Court of Appeal of the first half of the 20th Century. Another case to which reference should be made is *In re Ning Yi-Ching*, 56 T.L.R. 3 (K.B. 1939), which has been cited as support for a proposition that the writ does not run to foreigners in foreign territory. We do not, however, believe that it was correctly decided or that it can stand with the Appellate decisions we refer to. The judge, Mr. Justice Cassels, purported to follow the judgment of Lord Justice Kennedy in *Sekgome*. He overlooked, however, both the fact that Lord Justice Kennedy was in the minority and the fact that Lord Justice Kennedy himself considered the nationality of the detained person to be irrelevant to the jurisdiction to issue the writ. Furthermore under the treaties governing the concession in which the detained persons were held the British Authorities had no jurisdiction over non-nationals, and there was in any event another local court before which the detention could be challenged. Finally in *Ex parte Mwenya*, Lord Evershed, M.R., and Lord Justice Sellers held that Mr. Justice Cassels's approach was wrong.

[22] See [1960] 1 Q.B. at 265, quoting affidavit.

[23]See judgment page, *id.* at 290.

[24]See argument of Counsel for the Secretary of State, *id.* at 285.

member of the English Court of Appeal rejected this argument and concluded that the writ of habeas corpus could issue to any place under the "subjection" of the Crown and emphasised the necessity of considering the actual nature of the Crown's control over the territory in question, and so over the detention under challenge. The following were the key passages in the judgments:

> "As a matter of history and logic, the availability of the 'most efficient protection ever invented for the liberty of the subject' should not depend upon a mere label or on matters of convenience. * * * [¶] [T]he jurisdiction ought not to be limited to territories, outside England, which are strictly labelled 'colonies or foreign dominions' but will extend to territories which, having regard to the extent of the dominion in fact exercised, can be said to be 'under the subjection of the Crown' and in which the issue of a writ will be regarded (in Lord Mansfield's words) as 'proper and efficient.'" *Id.* at 303, per Lord Evershed, M.R.[25]
>
> "The writ is concerned with personal freedom and the emphasis in principle, it would seem, is not on where the wrongful detention is occurring but, assuming the court is satisfied that the detention is without justification whether it can, having regard to the proper interests, rights and powers of those governing the place of detention, make an order which can be enforced and so release an applicant who has asked for justice before it. * * * [¶] The judges in the earliest cases had not in mind the issue which arises here, but I think it would be difficult to read into any of them * * * a refutation of the powers of the English Court to issue the writ to safeguard a subject's freedom in a territory over which this country had wide powers of jurisdiction and control, wide enough to enforce as a matter of ordinary administration any order the court might make." *Id.* at 309, per Lord Justice Sellers.

[25]See also Lord Evershed, M.R., *id.* at 297, and Lord Justice Romer, *id.* at 305.

***Regina (Bancoult)* v. *Sec'y of State for Foreign and Commonwealth Affairs*, [2001] Q.B. 1067 (Q.B.D. Admin. Ct.):**

This case was concerned with the availability of another prerogative writ[26] to a territory under the Crown's "subjection." The Crown submitted that the territory although a colony, enjoyed a separate and distinct sovereignty[27] and that as a result the writ of the High Court in London could not run there. Lord Justice Laws and Mr. Justice Gibbs rejected this argument. Referring to the writ of habeas corpus and to *Ex parte Mwenya*, Lord Justice Laws said:

> "[I]t is plain that the court in *Ex p Mwenya* * * * saw nothing in any earlier jurisprudence * * * to inhibit them from concluding that the writ of habeas corpus might in a proper case issue beyond the seas, 'to any place under the subjection of the Crown.' Indeed the weight of authority pointed firmly towards just such a conclusion."[28]

***The Queen (on the application of Abbasi)* v. *Sec'y of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598, [2002] All E.R. (D.) 70 (Nov.):**

This case was brought in the English courts on behalf of a British national captured by United States forces in Afghanistan and held at Guantanamo Bay since January 2002. He sought an order to compel the United Kingdom Secretaries of State to make representations on his behalf to the United States Government. His claim was founded on the contention that his "fundamental human right" not to be arbitrarily de-

[26]The writ of certiorari to quash an ordinance passed by the Commissioner exercising powers over a British Indian Ocean Territory.

[27]See *id.* at 1072 & 1086 ¶ 21.

[28]See *id.* at 1091 ¶ 26.

tained had been infringed because he had been denied access to a court, the United States District Court for the District of Columbia having dismissed habeas corpus applications by other British subjects held at Guantanamo Bay for want of jurisdiction—*Rasul* v. *Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002). His submission was that in these circumstances the Secretaries of State owed him a duty under English law to take steps to redress the position.

The English Court of Appeal, presided over by the Master of the Rolls, held that the denial of access to a court in Abbasi's case was in conflict with the fundamental principles of English law and of public international law. The Court stated its belief that United States law recognized the same principles. The Court emphasised (paragraph 65) that Abbasi's detention as an alleged "enemy combatant" might prove to be justified, and that the United Kingdom also had legislation to deal with suspected international terrorists.[29] Nonetheless the Court said:

> "66. What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. The question for us is what attitude should the courts in England take pending review by the appellate courts in the United States, to a detention of a British Citizen the legality of which rests (so the decisions of the United States Courts so far suggest) solely on the dictate of the United States Government, and, unlike that of United States' citizens,

[29]We understand that the Petitioners deny that they are or have been enemy combatants or members of any terrorist group and that no evidence to the contrary has been disclosed by the United States Government in respect of any of them. Pet. in No. 03-334 at 3; Pet. in No. 03-343 at 2–3.

> is said to be immune from review in any court or independent forum."

In the result the Court of Appeal held that it could not compel the Secretaries of State to intervene by diplomatic or any other means. The judgment is, however, further clear and weighty authority for the propositions that neither the nationality of the detained person nor the absence of sovereignty over the place of detention would preclude an English court from entertaining a habeas corpus application, provided that the authority in actual control of the detained person was subject to the court's jurisdiction. We refer the Court to the whole of the judgment, but for convenience set out some further passages of importance:

> "59. The United Kingdom and the United States share a great legal tradition, founded in the English common law. One of the cornerstones of that tradition is the ancient writ of habeas corpus * * *. The court's jurisdiction was recognised from early times as extending to any part of the Crown's dominions * * *.
>
> "60. The underlying principle, fundamental in English law, is that every imprisonment is prima facie unlawful * * *. This principle applies to every person, British citizen or not, who finds himself within the jurisdiction of the court * * *."
>
> "63. The recognition of this basic protection in both English and American law long pre-dates the adoption of the same principle as a fundamental part of international human rights law. * * *
>
> "64. For these reasons we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'."

In conclusion (at ¶ 107.iii) the Master of the Rolls said:

> "The position of detainees at Guantanamo Bay is to be considered further by the appellate courts in the United States. It may be that the anxiety we have expressed will be drawn to their attention. We wish to make it clear that we are only expressing an anxiety that we believe was felt by the Court in *Rasul*. As is clear from our judgment, we believe that the United States courts have the same respect for human rights as our own."

CONCLUSION

If it were the United Kingdom, and not the United States of America, which controlled the Guantanamo Bay Naval Base and the detained persons held there, then the writ of habeas corpus would be available before the English Courts regardless of the nationality of the detained persons. We are, furthermore, unaware of any authority indicating that the position would be any different in any other Commonwealth State.

Respectfully submitted,

SIR SYDNEY KENTRIDGE, Q.C.
Brick Court Chambers
7-8 Essex Street
London WC2R 3LD
44 207 379 3550

STEPHEN J. POLLAK*
JOHN TOWNSEND RICH
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

COLIN NICHOLLS, Q.C.
3 Raymond Buildings
London WC1R 5BH
44 207 400 6400

TIMOTHY OTTY, BARRISTER
20 Essex Street
London WC2R 3AL
44 207 842 1200

Attorneys for the Commonwealth Lawyers Association

October 3, 2003

**Counsel of Record*

FILED
OCT 3 2003
OFFICE OF THE CLERK

Nos. 03-334; 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF DIEGO C. ASENCIO, A. PETER BURLEIGH, LINCOLN GORDON, ALLEN HOLMES, R. JWOZNIAK, ROBERT V. KEELEY, SAMUEL W. LEWIS, ROBERT A. MARTIN, ARTHUR MUDGE, DAVID NEWSOM, R. H. NOLTE, HERBERT S. OKUN, ANTHONY QUAINTON, WILLIAM D. ROGERS, MONTEAGLE STEARNS, VIRON P. VAKY, RICHARD N. VIETS, ALEXANDER F. WATSON, AND WILLIAM WATTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

WILLIAM M. HANNAY
Counsel of Record
KATHRYN D. ZALEWSKI
ARON L. BORNSTEIN
SCHIFF HARDIN & WAITE
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5500
Counsel for Amici Curiae

183408

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF AMICI CURIAE

Each of the *amici curiae* has been in the diplomatic service of the United States government, for the most part as a presidential appointee.[1]

The names and diplomatic posts of the *amici curiae* are as follows:

Diego C. Asencio served as Ambassador to Colombia from 1977 to 1980, Assistant Secretary of State for Consular Affairs from 1980 to 1983, Ambassador to Brazil from 1983 to 1986, and Chairman of the Commission for the Study of International Migration and Cooperative Economic Development from 1987 to 1989.

A. Peter Burleigh served as Ambassador and Coordinator for Counter-Terrorism from 1991 to 1992, Ambassador and Deputy Permanent Representative to the United Nations from 1997 to 1999, and Ambassador to Sri Lanka and the Maldives from 1995 to 1997.

Lincoln Gordon served as Ambassador to Brazil from 1961 to 1966 and Assistant Secretary of State for Inter-American Affairs from 1966 to 1967.

Allen Holmes served as Ambassador to Portugal from 1982 to 1985, Assistant Secretary of State for Political-Military Affairs from 1985 to 1989, and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict from 1993 to 1999.

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1. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

William Watts served as a Foreign Service Officer from 1956 to 1965 and Staff Secretary and Senior Staff Member of the National Security Council in the White House from 1969 to 1970.

Each is persuaded, as will appear below, that these cases present issues of profound importance to the future role and influence of the United States in the world. Accordingly, a*mici curiae* submit this brief in support of the petitioners, Shafiq Rasul, *et al.* and Fawzi Khalid Abdullah Fahad Al Odah, *et al.*

SUMMARY OF ARGUMENT

The courts below denied review of the executive branch's incarceration of the petitioners, effectively holding that when the executive acts against foreign citizens on foreign soil, it may do so with impunity, free of even minimal judicial review. These rulings undermine what has long been one of our proudest diplomatic advantages – this nation's constitutional guaranty, enforced by an independent judiciary, against arbitrary government power.

The rulings have not gone unnoticed abroad. Governments and international organizations have criticized them. Some have even interpreted the rulings as a license to incarcerate their own citizens and others without judicial review.

ARGUMENT

We, the *amici curiae* lending our names in support of this brief, have all been in the diplomatic service of the United States. Some have been ambassadors or foreign service officers, others have had appointments at senior levels in the Department of State or in the other agencies of the United States Government, dealing with "that vast external realm." All are retired from public service.

It is not our purpose to address the legal issues. They are for the parties. We hope rather to enlarge their presentation by setting before the Court our collective professional experience as to the significance for American diplomacy and international affairs of the holdings of the court below.

We understand that the D.C. Circuit Court held that the detention by the United States Government of twelve Kuwaiti nationals, two British nationals, and two Australian nationals in Guantanamo is beyond judicial review. These sixteen Guantanamo prisoners undeniably are incarcerated. They are kept in small cells. Their every activity is controlled by officers of the Executive Branch of the Government of the United States. They have had no hearing. They have no access to independent counsel. They may, for all that appears, be held in Guantanamo forever, yet no tribunal, military or civilian, has found that they committed a crime. Nor, for so long as the lower court's determination stands, can a court inquire into their custody. These sixteen have been deprived of their liberty without due process of law. But the issue is not whether the detentions will withstand constitutional inquiry. The issue before this Court is whether the detentions are subject to any judicial review whatsoever.

This is, from our foreign policy experience, a case of vast public import. Indeed, it has already become notorious abroad. The world has taken due note of the fact that the United States has incarcerated these foreign nationals in Guantanamo and that there has been no effort to charge, try or judge them under the law. This has produced wide protest. The Inter-American Commission on Human Rights has undertaken precautionary measures.[2] The UN High Commissioner for Human Rights has spoken out.[3] The International Committee of the Red Cross has gone on record.[4] The British Court of Appeal in the Abbasi case has

2. Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), Inter-Am. C.H.R. (March 12, 2002) *reprinted in* 41 I.L.M. 532 (2002) (requesting that prisoners be granted hearings on their status before a "competent tribunal").

3. Press Release, Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba, (Jan. 16, 2002), *available at* www.unhchr.ch under "news room, statements/messages" (last visited Sept. 30, 2003) (recalling that legal status of detainees, if disputed, must be determined by a "competent tribunal"); *see also* Press Release, US Court Decision on Guantanamo Detainees Has Serious Implications for Rule of Law, says UN Rights Expert, (March 12, 2003), *available at* www.unhchr.ch under "news room, press releases" (last visited Sept. 30, 2003) (ruling below "offends the first principle of the rule of law" and "can set a dangerous precedent").

4. Operational Update, *Guantanamo Bay: Overview of the ICRC's work for detainees*, Int'l Comm. of the Red Cross (Aug. 25, 2003), *available at* www.icrc.org (last visited Sept. 30, 2003) ("The ICRC's main concern today is that the US authorities have placed the internees in Guantanamo beyond the law. . . .").

expressed its concerns.[5] The Human Rights Chamber of Bosnia-Herzegovina, a court that the United States helped create, has issued its own protest.[6]

The world understands that there is debate in this country over the extent to which our criminal justice system must be amended to take account of the realities of terrorism. That is a domestic matter. The Guantanamo prisoners case has become a matter of unusual concern abroad because it presents the issue of how American power may be applied to people in other countries. Citizens of foreign countries cannot assume that what happened to the Guantanamo prisoners cannot happen to them. It will not be evident why, if the Executive Branch can detain prisoners in Guantanamo free of judicial inquiry, it cannot expand the practice to establish a global criminal justice system with a series of prison camps like Guantanamo which would be similarly subject to no legal oversight and in which any foreigner might be detained.

5. *Abbasi v. Secretary of State*, 2002 EWCA Civ 1598, 2002 All ER (D) (Nov) (U.K. Ct. App. 2002), par. 107 ("We have made clear our deep concern that, in apparent contravention of fundamental principles of law, Mr. Abbasi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.").

6. *Boudellaa et al. v. Bosnia and Herzegovina et al*, Decision on Admissibility and Merits, Cases nos. CH/02/8679 *et seq.*, Human Rights Chamber for Bosnia and Herzegovina (Oct. 11, 2002), *available at* www. hrc.ba (visited Sept. 30, 2003), pars. 233 (hand-over of prisoners to U.S., before their transfer to Guantanamo, violated "obligations to protect the applicants against arbitrary detention by foreign forces") & 333 (Bosnia and Herzegovina must retain lawyers "to take all necessary action in order to protect the applicants' rights while in US custody. . . .").

The lower court's decision turned on the fact that the prisoners are in Guantanamo, Cuba. The use by the American military of its famous base in Cuba has a particular resonance abroad. As this Court well knows, Guantanamo is an artifact of America's imperial era in this Hemisphere. The nice distinction in the Court of Appeals' opinion – that the executive branch of the United States government can act as it will in Cuba, but the hand of the judiciary cannot reach that conduct – will be lost on others.

It has been the experience of each of us that our most important diplomatic asset has been this nation's values. Power counts. But this nation's respect for the rule of law – and in particular the nation's reverence for the fundamental Constitutional guarantee of individual freedom from arbitrary government authority – have gone far to earn us the respect and trust which lie at the heart of all cordial relations between nations. Thus the perception of this case abroad – that the power of the United States can be exercised outside the law and even, it is presumed, in conflict with the law – will diminish our stature and repute in the wider world.

We have come to believe, in our representation of this country to other nations, that those nations are more willing to accept American leadership and counsel to the extent that they see us as true to the principle of freedom under the law. Indeed, the matter has rarely been better put than President Bush put it in signing the Torture Victims Protection Act on March 12, 1992:

> In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen

> our commitment to ensuring that they are respected everywhere.[7]

The teaching of the courts below, however, is that those "democratic institutions and the rule of law" need not be respected in Guantanamo. This negative example puts United States citizens abroad – as well as those of other nations – at risk because it provides a justification for other countries' practices of arbitrary detention. When the second Gulf War began, many predicted that the United States' practices at Guantanamo Bay signaled a "double standard" that Iraq and others would use to justify mistreatment of American and coalition POWs.[8] Unfortunately, that message appears to have been received loud and clear by other foreign governments which have since sought to use the United States' example to justify abuses. For example, seeking to justify the detention

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7. Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 465 (March 12, 1992).

8. *See, e.g.*, Jamie Fellner, *Prisoners of War in Iraq and at Guantanamo; Double Standards*, INT'L HERALD TRIB., March 31, 2003 ("At risk are not only the rights of the individuals who are detained today: by ignoring the clear mandates of international law, the United States invites every other country, including Iraq, to do the same."); Ivan Roman, *Critics: Guantanamo Example May Hurt POWs*, ORLANDO SENTINEL, March 30, 2003 ("Months before the first bomb was dropped on Baghdad on March 19, concerns arose about the Pentagon's position regarding the Guantanamo detainees and the implications it could have on its own troops heading to the Middle East."); Praful Bidwai, *Iraq: Doubts Grow on Quick Coalition Victory*, INT'L PRESS SERV., March 24, 2003 ("double standards" "starkly revealed" by detention of suspects in Guantanamo, "often in chains and inside cages. . . . Equally deplorable is the U.S. threat to treat Iraq's army officers as 'war criminals' merely because they are defending their country, while insisting that the U.S. prisoner-invaders be treated as POWs.").

of militants without trial, Malaysia's law minister said that its practice was "just like the process in Guantanamo Bay." He emphasized that he "put the equation with Guantanamo just to make it graphic to you that this is not simply a Malaysian style of doing things." Sean Yoong, *Malaysia slams criticism of security law allowing detention without trial*, Assoc. Press, Sept. 17, 2003.[9]

The present Administration summed up two centuries of foreign policy, embraced by Democratic and Republican administrations alike, in the National Security Strategy of the United States of America, issued in September 2002. That document said that the essence of American foreign policy was a "distinctly American internationalism that reflects the union of our values and our national interests." It added that "[i]n pursuit of our goals, our first imperative is to clarify what we stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere." It promised: "We will speak out honestly about violations of the nonnegotiable demands of human dignity." And it defined these "nonnegotiable demands of human dignity" as including "the rule of law", "equal justice," and "limits on the absolute power of the state."[10]

---

9. Egypt has also moved to detain human rights campaigners as threats to national security, as have Ivory Coast, Cameroon, and Burkina Faso. "The insistence by the Bush administration on keeping Taliban and Al Qaeda captives in indefinite detention in Guantanamo Bay, Cuba, instead of jails in the United States – and the White House's preference for military tribunals over regular courts – helps create a free license for tyranny in Africa." Shehu Sani, *U.S. actions send a bad signal to Africa: Inspiring intolerance*, INT'L HERALD TRIB., Sept. 15, 2003.

10. National Security Strategy of the United States of America (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nss.html.

In our professional experience we have found these principles to be the strongest assets of American diplomacy. The success of American diplomacy turns importantly on the extent to which this nation is perceived as abiding by these principles. The hint that America is not all that it claims, that it is prepared to negotiate or ignore a "nonnegotiable demand of human dignity", that it can accept that the executive branch may imprison whom it will and do so beyond the reach of due process of law demeans and weakens this nation's voice abroad.

We have taken it as our duty to so state to this court. Power counts, and there is no doubting America's power at this juncture. But values count too. And, for this nation, there is no benefit in the exercise of our undoubted power unless it is deployed in the service of fundamental values: democracy, the rule of law, human rights, and due process. To the extent that we are perceived as compromising those values, to that extent will our efforts to promote our interests in the wider world be prejudiced. Such at least is our collective experience.

CONCLUSION

For the reasons stated above, we request that this Court grant a writ of *certiorari* in each of the cases captioned above.

Respectfully submitted,

WILLIAM M. HANNAY
Counsel of Record
KATHRYN D. ZALEWSKI
ARON L. BORNSTEIN
SCHIFF HARDIN & WAITE
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5500

Counsel for Amici Curiae

Supreme Court, U.S.
FILED
OCT 3 2003
OFFICE OF THE CLERK

(5) (6)

Nos. 03-334, 03-343

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Petitioners,

v.

UNITED STATES OF AMERICA ET AL.,

Respondents.

On Petition for Writ of Certiorari to the UnitedStates Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER AMERICAN PRISONERS OF WAR AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

THOMAS F. CULLEN, JR.
(Counsel of Record)
CHRISTIAN G. VERGONIS
BETSY A. MILLER
FAHAD A. HABIB
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Prisoners of war are in a vulnerable situation, at the mercy of their captors and beyond the reach of their own government. Force of arms cannot protect them, and the force of law relies on a reciprocal, consensual regime of understandings among the combatant nations robust enough to be recognized and respected despite the emotions and exigencies of war. *Amici* have been in that vulnerable position, have benefited from these international understandings, and have suffered in their absence. The Geneva Conventions on the treatment of those detained in a combat zone, the body of law amplifying those conventions, and the United States' commitment to implementing them, were, at that critical juncture, their primary protection and the only means our government had to protect them.

Amici are Leslie H. Jackson, Edward Jackfert, and Neal Harrington, former American prisoners of war detained by the German and Japanese governments during World War II. Mr. Jackson is the Executive Director of American Ex-Prisoners of War, a non-profit, congressionally chartered veterans organization that represents approximately 50,000 former prisoners of war and their families. Mr. Jackfert is the former National Commander of the American Defenders for Bataan & Corregidor, Inc., an organization that supports former POWs held by the Japanese during World War II. Mr. Harrington is also involved in POW activities, particularly relating to those who, like he and Mr. Jackfert, survived the infamous Bataan Death March.

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[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

Mr. Jackson was captured by the German Army on April 24, 1944, when his B-17 bomber crashed. Jailed and interrogated for approximately one week, he was then transported to Stalag 17, a converted concentration camp. In his 13 months of captivity, Mr. Jackson was granted the bare necessities: shelter, minimal food, and the ability to socialize with other American POWs. While the experience was harsh and unpleasant, Mr. Jackson was never tortured or otherwise hurt by the German guards. To follow the terms of the Geneva Conventions of 1929, to which Germany was a party, Mr. Jackson's German captors placed the appropriate Geneva Convention signage in the barracks, permitted the International Red Cross to ship basic necessities to the POWs, and allowed a Geneva inspector to survey the premises. Mr. Jackson believes that his survival and relatively good health while in captivity are the result of the German Army's adherence to the 1929 Geneva Conventions.

The experiences of Mr. Jackfert and Mr. Harrington in the custody of Japan, which had not ratified and did not purport to follow the 1929 Geneva Conventions, offer a sharp contrast. Both men were serving with the U.S. Army in the Philippines when it surrendered to the Japanese in 1942, and both subsequently served several years of hard captivity beyond the reach of any Geneva Convention protections. Both were part of the Bataan Death March and its well-documented horrors. Mr. Harrington was forced into slave labor in a Japanese coal mine, and saw his compatriots starved, beaten, and killed. Mr. Jackfert was also forced into slave labor and suffered the extreme effects of heavy labor and cruelly inadequate nourishment, going from 125 pounds to 90 pounds in a matter of months. There was no Geneva signage, no recognition of prisoner rights, and virtually no Red Cross access.

Nor were the experiences of Mr. Harrington and Mr. Jackfert atypical. Studies have determined that the death rate of U.S. military personnel interned by Japan was as high as 40%, while the death rate of personnel captured and interned by Germany was little more than 1%. *See* Gary K. Reynolds, Congressional Research Service, *U.S. Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan* 10 (updated July 27, 2001) (citing Charles A. Stenger, *American Prisoners of War in WWI, WWII, Korea, Vietnam, Persian Gulf, Somalia, Bosnia, and Kosovo* (2000)); *see also Encyclopedia of Prisoners of War and Internment* 329, 335 (Jonathan F. Vance ed., ABC-CLIO 2000) (providing similar estimates). Moreover, while it was rare for American POWs detained in Germany to be tortured, the opposite was true for American POWs in Japan. "No one can adequately impart the suffering most Allied prisoners endured [in Japan] . . . . They were beaten, kicked, robbed . . . and were buried alive. . . . [T]he overwhelming majority endured 'hell on earth' . . . ." *Encyclopedia of Prisoners of War and Internment*, *supra*, at 336.[2]

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[2] Notably, the difference in treatment of American POWs was not merely the result of differences between the Germans and the Japanese. Contrary to their humane treatment of American POWs, the Germans treated prisoners from Russia, which had not ratified the Geneva Conventions of 1929, with absolute cruelty. "Of 5.7 million captured Red Army soldiers, about 3.3 million died in German captivity — a staggering mortality rate of 57 percent." *Id.* at 329. Nor was this simply a function of the harsh Russian climate. German soldiers deliberately starved Russian POWs, forced them into slave labor, and sent some to the gas chambers. *Id.* at 331. Thus, the importance of the Geneva Conventions — not simply of their existence, but of the reciprocity enjoyed by mutual parties to the Conventions — cannot, and should not, be underestimated.

As a result of their own experiences, *amici* have an interest in fostering the development, acceptance, and enforcement of international norms pursuant to which prisoners of war and others captured during armed conflicts will be treated humanely and in accordance with the rule of law. In particular, *amici* wish to ensure that the treatment by the United States of foreign detainees during the ongoing armed conflicts in Afghanistan, Iraq, and elsewhere is such that the United States and former American POWs retain the moral authority to demand fair and humane treatment for any future Americans detained by foreign governments. *Amici* also support the involvement of the judiciary in the development and evolution of the substantive and procedural norms protecting such persons on the conviction that a well-developed and stable body of laws and rules is more likely to result in even-handed, predictable, and humane treatment of detainees by the nations of the world.

INTRODUCTION AND SUMMARY OF ARGUMENT

The principle that humanitarian norms apply to prisoners of war and others detained during armed conflicts has at last, following a long history of horrors in captivity, achieved near-universal acceptance. Most famously realized in the various Geneva Conventions negotiated in the wake of the two world wars, these norms confer upon detainees both substantive rights and the right to a judicial determination of their proper status, thereby providing a predictable level of protection to those who are among the most vulnerable of the victims of war.

The United States has ratified the Geneva Conventions, expressly incorporated them into its written military regulations, and adhered to them in prior conflicts. Over the past half-century, moreover, the United States has played a prominent role in demanding that detainees be treated by foreign governments in accordance with the Geneva Conventions. Recently, however, the United States' treatment of detainees captured during the war on terrorism and its reluctance to reconcile its actions with the norms of the Geneva Conventions or submit them to the scrutiny of the courts, has resulted in widespread doubt about the United States' actual commitment to those norms.

Genuine, demonstrated commitment to the principles of the Geneva Conventions is vital to the United States' moral authority to demand compliance by other nations with those agreements. Contrary to the D.C. Circuit's conclusion that the courts should not be involved in this process, development of this body of law requires rather than excludes a judicial role. Even where executive discretion is broadest, the *fact* of review is a formidable protection. And there is law to apply here: impartial tribunals are particularly well-suited to determine whether the detentions at issue comply with the procedural and substantive guarantees that find expression in the Geneva Conventions, United States military regulations, and the United States Constitution. Indeed, the Conventions and military regulations themselves expressly contemplate the involvement of competent tribunals in making these determinations. Even if the detainees' claims are ultimately deemed to lack merit, independent judicial review would erase the suspicion of executive overreach and provide the international community with assurances that the United States' detentions are not arbitrary or in derogation of the Geneva Conventions.

Just as significantly, judicial review will enable the courts of the United States to contribute to the long-term development and evolution of international humanitarian law by giving meaning to, and filling the interstices in, the governing rules. This, in turn, will lead to a mature and stable body of rules that can be predictably applied by, and demanded of, all nations in all future conflicts.

In the decision below, the D.C. Circuit held that American courts lack jurisdiction to determine whether petitioners' rights were violated. Because this Court's prior cases have been unclear about the scope of the rights possessed by aliens abroad and the jurisdiction of the courts to enforce those rights, this area of law is in need of clarification. Moreover, because of the large number of detainees already in the custody of the United States military and the likelihood that more detentions will follow in connection with the global war on terror, the issue warrants the Court's immediate attention.

ARGUMENT

I. REVIEW OF THE DECISION BELOW IS NEEDED TO DETERMINE WHETHER THE FEDERAL JUDICIARY WILL HAVE ANY ROLE TO PLAY IN AN AREA OF IMMEDIATE AND LASTING INTERNATIONAL IMPORTANCE

In concluding that the courts lack jurisdiction to review petitioners' claims, the D.C. Circuit effectively held that the judiciary is to have no role at all either in protecting against potential abuses or errors by the executive in connection with the detention of aliens captured during armed conflicts, or in contributing to the evolution of the legal rules governing such detentions. Because of the significance of this ruling on the United States' vital interests in furthering the humane treatment of persons detained during wartime, such a drastic reversal of the ordinary presumption of judicial review should not be implemented prior to careful consideration of the issues by this Court.

A. The United States Considers Itself Bound By Rules Governing the Treatment of Detainees

While the United States' efforts to protect individuals detained during wartime date back to the earliest days of the Republic, human rights abuses suffered by prisoners and

civilians during the first and second World Wars were the stimulus for a series of multilateral agreements that today provide uniform and predictable standards for the humane treatment of prisoners of war and civilian victims of war. The first such multilateral agreements were the Geneva Conventions of 1929, which played a significant role in World War II. *See supra* pp. 2-3 & note 2. Ultimately, the international community negotiated the four Geneva Conventions of 1949, including the Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Convention" or "Geneva III"), and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Fourth Convention" or "Geneva IV"), both of which the United States ratified in 1955. *See* Geneva III, 6 U.S.T. at 3316; Geneva IV, 6 U.S.T. at 3516.

The Third Convention provides prisoners of war with substantive rights to humane treatment during their detentions and procedural rights governing determinations of the status of detainees. The substantive protections apply to persons who are "[m]embers of the armed forces of a Party to the conflict" or "[m]embers of other militias and . . . volunteer corps . . . belonging to a Party to the conflict," provided that certain additional considerations are satisfied. *See* Geneva III, arts. 4, 6, 6 U.S.T. at 3320, 3324, 75 U.N.T.S. at 138, 142. The procedural protections ensure that if there is "any doubt . . . as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy" are protected by the Convention, "such persons shall enjoy the protection of the . . . Convention until such time as their status has been *determined by a competent tribunal*." *Id.* art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (emphasis added).

The Fourth Convention relates to the protection of civilians in times of war. It, too, provides substantive rights to humane treatment, as well as procedural rights relating to status determinations. *See* Geneva IV, art. 43, 6 U.S.T. at 3544, 75 U.N.T.S. at 314; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 511-12 (2003). In particular, with certain narrow exceptions, civilians who have been interned have the right promptly to challenge their detentions before an appropriate court or administrative board. *See* Geneva IV, art. 43, 6 U.S.T. at 3544, 75 U.N.T.S. at 314.

In sum, in addition to providing one set of substantive rights for prisoners of war and another set for civilians, the Geneva Conventions also guarantee procedural protections — including the involvement of competent tribunals — to ensure that detained individuals are properly categorized and are receiving the substantive protections to which their particular status entitles them. Pursuant to the Geneva Conventions:

> "[E]very person in enemy hands must have some status under international law: he is either a prisoner of war . . . covered by the Third Conventions, a civilian covered by the Fourth Convention, or . . . a member of the medical personnel . . . covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law."

Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, 27-Fall Fletcher F. World Aff. 55, 66 n.49 (2003) (quoting International Committee of the Red Cross, *Commentary of the Fourth Geneva Convention* 51 (J.S. Pictet ed. 1952)).

The United States has chosen to implement the Geneva Conventions as part of its written military regulations. Thus, Army Regulation 190-8 states:

> [I]n accordance with Article 5, [Geneva III,] . . . . [a] competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities . . . and who asserts that he or she is entitled to treatment as a prisoner of war . . . .

U.S. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6 (1997); *see also id.* §§ 5-1b & 5-1g(1) (requiring status determinations by a competent tribunal and providing a right of appeal to interned civilians). These regulations provide a thoroughly articulated legal process requiring an independent status determination without exception and defining the roles and circumscribing the authority of officers in the field and reviewing authorities.

The United States has put its commitment to these norms in practice in past conflicts by providing procedural protections to verify the status of detainees. *See, e.g.*, U.S. Dep't of the Army, Field Manual on the Law of Land Warfare, FM 27-10 § 71(a) (1956) (providing for "a competent tribunal" to determine the status of "any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists"); MACV Directive No. 20-5, § 5(e) (Sept. 21, 1966, as amended, Dec. 16, 1966) ("[i]n . . . doubtful cases the necessity for a determination of status by a tribunal may arise"), *quoted in* Prisoners of War, 10 Whiteman, *Digest of International Law* 216 (1968); Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* 578 (1992) (noting that the status of almost 1200 detainees from the 1991 Persian Gulf War was determined by tribunals). As these examples show, the use of tribunals traditionally has been an integral

component of the United States' treatment of persons captured on enemy soil.

B. Judicial Review of the United States' Detentions Promotes the Development and Evolution of a Stable Body of Rules That Can Be Predictably Applied by, and Demanded of, All Nations in All Future Conflicts

Through its support of multilateral treaties and the promulgation of written military regulations, both of which require the involvement of impartial tribunals as a check against potential executive excess and error, the United States has thus taken a strong stance in favor of treating detainees in accordance with the rule of law. However, as demonstrated by the strong international outcry against the United States' treatment of the Guantánamo Bay detainees, and the equally strong insistence by the Executive Branch that the United States is acting in full compliance with international law, disputes over the scope and application of the Geneva Conventions and other international rules are inevitable. Judicial review of the detainees' claims that they are being deprived of procedural protections to which they are entitled would have a number of ameliorating consequences.

In particular, the long-term development and stability of international rules governing the rights of detainees would benefit from the application of judicial review. It is a core part of the judicial role that courts act as a check against arbitrary excesses by executive-branch officials. Moreover, courts applying common-law methodologies are particularly well-equipped to dispassionately interpret written rules and regulations and to apply them without fear or favor where appropriate based on particular facts. As the courts hear more claims, the meaning and applicability of the Geneva Conventions can be examined and clarified. A body of adjudication, and the concomitant creation of more law, would therefore further the fundamental goal of the Geneva

Conventions that detainees captured during wartime are treated in accordance with a stable body of rules that can be predictably applied by, and demanded of, all nations. This is not to suggest that every status determination is subject to *de novo* review in the district courts, or to prejudge the nature of the review necessary to determine whether appropriate procedures have been followed and appropriate standards applied. It is merely to say that lines can be drawn that give life to protections and legitimacy to authority.

The United States' ability to demand international compliance with the norms expressed in the Geneva Conventions depends on the United States' own demonstrable compliance. The availability of judicial review can be a key component of demonstrable and principled compliance. History shows the importance of this concern, as the United States has, in the past, demanded that other nations treat American and allied prisoners in accordance with the principles of the Geneva Conventions, citing the requirements of international law and frequently contrasting the United States' record of compliance with the actions of the offending state.

For example, during World War I, the United States protested the mistreatment of American prisoners of war in Germany and demanded that the German government "'immediately take such steps as will effectively guarantee to American prisoners in its hands, both in letter and in spirit, that humane treatment which by all the principles of international law and usage is to be expected from the Government of a civilized state and its officials.'" Prisoners of War: Treatment, 6 Hackworth *Digest of International Law* § 577, at 278 (1943) (quoting Secretary of State (Lansing) to the Ambassador in Spain (Willard), telegram 850, Jan. 28, 1918, MS. Department of State, file 763.72114/3240a; 1918 For. Rel., Supp. 2, at 19).

Similarly, during World War II, the United States severely warned Japan that its leaders and citizens would be held accountable for the maltreatment of U.S. and allied soldiers, including the atrocities committed in the Bataan Death March and the abuse of Filipino civilians. *See* Maj. Michael L. Smidt, *Yamashita, Medina & Beyond: Command Responsibility in Contemporary Military Operations*, 164 Mil. L. Rev. 155, 174 (2000) (citing 203 Judgment Of The International Japanese War Crimes Trials In The International Military Tribunal For The Far East 49,748 (1948)).

When America went to war in Vietnam, the Government again reiterated its commitment to the principles of the Geneva Conventions and demanded the same of the enemy. Secretary of State Rusk stated unequivocally that "'[t]he United States Government has always abided by the humanitarian principles enunciated in the Geneva conventions and will continue to do so.'" Prisoners of War, 10 Whiteman *Digest of International Law*, § 7, at 214-15 (1968) (quoting Letter from Secretary of State Rusk to Jacques Freymond, Vice President of the International Committee of the Red Cross, *reprinted in* LIII Bulletin, Department of State, No. 1368, Sept. 13, 1965, at 447). Expressing that it was "'gravely concerned that some [U.S. military and civilian] prisoners may not be treated humanely,'" the United States contrasted its and its allies' treatment of enemy prisoners:

> "Viet Cong and North Vietnamese prisoners held by the Government of Viet-Nam are confined in camps regularly inspected by the [International Committee of the Red Cross]. These prisoners include many captured by U.S. forces and turned over to the Government of Viet-Nam for safekeeping under the provisions of the Geneva convention. Their treatment and the conditions of their confinement have been humane and in accord with the convention, as verified by these neutral observers."

Id. at 221-23 (quoting LVII Bulletin, Department of State, No. 1467, Aug. 7, 1967, at 170).

Similarly, following Iraq's invasion of Kuwait in August 1990, the United States joined other members of the U.N. Security Council in "[c]ondemning the actions by the Iraqi authorities and occupying forces to take third-State nationals hostage and to mistreat and oppress Kuwaiti and third-State nations . . . in violation of . . . the [Fourth] Geneva Convention" and other international agreements. U.N.S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/RES/674 (1990).

Most recently, in response to the televised display of captured American soldiers by Iraqi authorities earlier this year, U.S. officials chastised this conduct as a violation of the principles of the Geneva Conventions. President Bush stated: "I expect [the U.S. prisoners of war] to be treated humanely . . . just like we're treating the prisoners that we have captured humanely. If not, the people who mistreat the prisoners will be treated as war criminals." White House Release, *President Discusses Military Operation* (Mar. 23, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/03/20030323-1.html. Deputy Secretary of Defense Wolfowitz similarly contrasted Iraq's treatment of prisoners with treatment accorded by the United States:

> We've seen those scenes on Al Jazeera that others have seen. We have reminded the Iraqis . . . that there are very clear obligations under the Geneva Convention to treat prisoners humanely, not to humiliate them, and in this case, I think we'll be in a position before long to enforce any violations of the Geneva Convention. We treat our own prisoners, and there are hundreds of Iraqi prisoners, extremely well. We feed them, we take care of them, they're very safe with us.

Dep't of Defense News Transcript, *Deputy Secretary Wolfowitz Interview with New England Cable News* (Mar. 23, 2003), *available at* http://www.defenselink.mil/transcripts/2003/t03242003_t0323nec.html.

As this historical record shows, U.S. treatment of enemy prisoners in accordance with the principles of the Geneva Conventions has been a powerful basis for demanding that American soldiers receive the same standard of treatment. General Eisenhower pithily explained this reasoning in his response to an inquiry by a Soviet general as to why the United States expended a high level of effort in its treatment of German prisoners:

> [I]n the first place my country was required to do so by the terms of the Geneva Convention. In the second place, the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he already was doing.

Dwight D. Eisenhower, *Crusade in Europe* 469 (1949).

General Eisenhower's reasoning remains just as valid today. The United States has enjoyed a long history as a leader in worldwide democracy, humanitarian law, and human rights law. But these past accomplishments and the principles of our past conduct do not seem compelling to other nations that have begun to rely on the United States' recent practices as excuses for their human rights abuses:

> African leaders with reputations for political intolerance have learned to use the war against terror as a justification for clamping down on the opposition. Uganda's president . . . and Zimbabwe's [president] . . . have on several occasions referred to their respective opposition elements as terrorists. Platitudes used in speeches by [President Bush] and [Israeli Prime Minister Sharon] have become favorite phrases of African leaders who say they want to "wipe out" or "liquidate" or "crush" the "infrastructure of terror."

Shehu Sani, *U.S. Actions Send a Bad Signal to Africa Inspiring Intolerance*, Int'l Herald Trib., Sept. 15, 2003, at 6; *see also id.* (noting "[t]he insistence by the Bush administration on keeping Taliban and Al Qaeda captives in indefinite detention in Guantánamo Bay . . . helps create a free license for tyranny in Africa").

The United States cannot afford to tarnish its reputation as the standard-bearer for democracy and human rights. If it does, it puts at risk the safety of the men and women of our armed forces and its own ability to insist on compliance by other nations with the norms of the Geneva Conventions.

II. REVIEW OF THE DECISION BELOW IS NEEDED TO CLARIFY THE MEANING AND REACH OF PRIOR DECISIONS OF THIS COURT

The decision below creates serious problems and inconsistencies in U.S. legal doctrine, and does so largely as a result of the lack of clarity in some of this Court's prior pronouncements in this area. The D.C. Circuit's conclusion that "no court in this country has jurisdiction" to hear the claims of alien detainees captured by the United States military during armed conflict and held outside of the territory of the United States (Al Odah App. at 14) cannot be reconciled with settled rules of justiciability; it improperly conflates questions of jurisdiction with merits determinations; and it subverts the proper scope of the Great Writ for those who seek to test the legality of their detentions.

The threshold conditions for *jurisdiction* are plainly satisfied here. The detainees have standing to sue, as they have suffered concrete injury (a restriction of liberty without certain procedural protections) caused by the defendants and redressable by the relief sought. And their lawsuits,

premised on claims of right arising under the Constitution, treaties of the United States, federal law, and federal military regulations, undeniably present federal questions.

Moreover, there exists a statutory cause of action for vindication of those rights. The federal habeas statute allows a district court to grant the writ to a prisoner if, *inter alia*, "[h]e is in custody under or by color of the authority of the United States" or "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c). As a textual matter, the availability of § 2241 to petitioners is clear. Indeed, as this Court has observed, challenges to executive detentions invoke the Great Writ's protections in their purest form. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention"); *id.* at 303-04 (noting "the historical use of habeas corpus to remedy unlawful executive action" and "to redress the improper exercise of official discretion").

In denying the detainees recourse to the courts, the D.C. Circuit, relying primarily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), reasoned that the detainees have no substantive rights under U.S. law and therefore "cannot invoke the jurisdiction of [U.S.] courts to test the constitutionality or the legality of restraints on their liberty." (Al Odah App. at 16.) But it is well-settled that the existence *vel non* of a claim of right is separate from the question of subject-matter jurisdiction. *See Bell v. Hood*, 327 U.S. 678, 682-83 (1946). To the extent *Johnson* suggests otherwise and led the D.C. Circuit to conflate merits issues with the threshold issue of jurisdiction, that decision needs to be revisited and clarified by this Court.

Moreover, the D.C. Circuit's broad conclusion that, under *Johnson* and this Court's other precedents, alien detainees have *no* rights when detained by the United States military is

in conflict with prior pronouncements by this Court. While the Court's holdings on the applicability of the Constitution to aliens abroad have been somewhat unclear, the Court has never held that the rights of such aliens are non-existent. The Court's prior cases rejected only specific claims: *Johnson* held that prisoners of war did not have a right to be tried by civil, rather than military, tribunals, *see* 339 U.S. at 782-83, 785, and *United States v. Verdugo-Urquidez* held only that the Fourth Amendment did not apply to searches of foreign residences, *see* 494 U.S. 259, 275-76 (1990). Neither case held categorically that the Constitution or, in particular, the Due Process Clause of the Fifth Amendment, places *no restraints at all* on the Government's power to detain an alien indefinitely, without notice or an opportunity to contest before a tribunal (even a military one) the facts underlying that detention. To the contrary, in discussing the "coverage of our Constitution to nonresident alien enemies," *Johnson* acknowledged that alien enemies are "*entitled*" to precisely what petitioners seek here — a "judicial hearing to determine" their status. 339 U.S. at 784 (emphasis added).

Similarly, concurring in *Verdugo-Urquidez*, Justice Kennedy explained that courts must engage in a case-by-case adjudication of the extent to which constitutional limitations on the power of the United States must yield to other considerations, implying that some constitutional restrictions do apply when the Government acts on aliens abroad. *See* 494 U.S. at 277-78 (Kennedy, J., concurring) (noting that "[t]he proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances" (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring))); *see also id.* at 277 ("when the Government acts, in reference to an alien, within its sphere of foreign operations," the Court "must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate

power and authority abroad"). It is precisely the sort of case-by-case adjudication anticipated by Justice Kennedy that the decision below forestalls.

Moreover, this Court has recognized that even where a specific constitutional provision does not apply, rights can be made available to an alien abroad by "the political branches through diplomatic understanding, treaty, or legislation." *Verdugo-Urquidez*, 494 U.S. at 275. The rights asserted by petitioners here were created by the political branches and find expression in, among other things, the Geneva Conventions, which have been ratified by the United States, and in the Army regulations, which "implement[]" the Geneva Conventions, *see* Army Regulation 190-8 § 1-1b; *see also id.* § 1-1b(4) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.").

Indeed, the writ of habeas corpus has "traditionally issued as a means of reviewing the legality of the detention of aliens in the face of alleged treaty violations." *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 221 (3d Cir. 2003); *see also Mali v. Keeper of the Common Jail*, 120 U.S. 1, 11 (1877) (considering habeas corpus petition brought on behalf of alien sailor alleging violations of consular agreement between the United States and Belgium). Thus, in other contexts, the circuit courts have agreed that habeas relief is available under § 2241 for an individual who claims his continued detention violates a treaty, at least where the treaty has been implemented by federal law and regulations. *See, e.g., Ogbudimkpa*, 342 F.3d at 221 & n.24; *Wang v. Ashcroft*, 320 F.3d 130, 141 n.16 (2d Cir. 2003); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003). Similarly, courts "review military determinations by habeas corpus to insure that rights guaranteed by . . . military regulations are protected." *Allgood v. Kenan*, 470 F.2d 1071, 1073 (9th Cir. 1972); *see also Ornato v. Hoffman*, 546 F.2d 10, 14 (2d Cir. 1976) (noting that "habeas corpus is available . . . where there is a breach [by the military] of a self-imposed procedural regulation").[3]

There is, therefore, no valid basis for the D.C. Circuit's conclusion that the federal courts lack *jurisdiction* over petitioners' claims. Given the D.C. Circuit's reliance on *Johnson* and this Court's prior cases to reach this conclusion, it is evident that this Court needs to revisit these issues and bring needed clarity to this area of law. Doing so will not necessarily require the Court to decide the precise substantive scope of the detainees' rights under the Fifth Amendment or the Geneva Conventions. Nor will it require the Court to resolve the level of deference to be given to factual determinations of military officials. *Cf. Hamdi v. Rumsfeld*, 337 F.3d 335, 367 (4th Cir. 2003) (Luttig, J., dissenting from denial of rehearing *en banc*) (noting questions about the appropriate level of deference in a habeas proceeding brought by a U.S.-citizen detainee). Rather, the petitions raise only the narrow, but critical, question of whether, in a world in which the United States seeks to persuade other nations to govern in accordance with the rule of law, the United States will honor its own

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[3] That the military has implemented the Geneva Conventions in its regulations obviates the need to address whether the Conventions would otherwise be enforceable in U.S. courts. While the general rule is that a treaty must be "self-executing" to give rise to a cause of action, it is unclear whether this rule bars the assertion of treaty rights where another statute, such as § 2241, creates the cause of action. *See Ogbudimkpa*, 342 F.3d at 218 n.22 (explaining, but sidestepping, "the interesting issues . . . with respect to the availability of habeas relief under a non-self-executing treaty absent implementing legislation."). Whether the Geneva Conventions are self-executing is also unsettled. *See, e.g., United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) (concluding that certain provisions of the Geneva Conventions are enforceable by POWs in court).

commitment thereto by providing a judicial forum for testing the legality of its detentions.

CONCLUSION

The petitions should be granted.

Respectfully submitted,

THOMAS F. CULLEN, JR.
(*Counsel of Record*)
CHRISTIAN G. VERGONIS
BETSY A. MILLER
FAHAD A. HABIB
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Amici Curiae

October 3, 2003

(6) (7)

Nos. 03-334, 03-343

Supreme Court, U.S.
FILED
OCT 3 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

—and—

SHAFIQ RASUL, *et al.*,

Petitioners,

—v.—

UNITED STATES, *et al.*,

Respondents,

—and—

GEORGE W. BUSH, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF THE HUMAN RIGHTS INSTITUTE OF THE INTERNATIONAL BAR ASSOCIATION IN SUPPORT OF PETITIONERS

Vaughan Lowe
Guy S. Goodwin-Gill
ALL SOULS COLLEGE
UNIVERSITY OF OXFORD

Pamela Rogers Chepiga
Counsel of Record
Andrew B. Matheson
Karen Lee
Nathan Reilly
ALLEN & OVERY
1221 Avenue of the Americas
New York, New York 10020
(212) 610-6300

Attorneys for Amicus Curiae

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Interest of the Amicus Curiae

The amicus, the Human Rights Institute of the International Bar Association (the "Institute") is an international body, headquartered in London, England, that helps promote, protect and enforce human rights under a just rule of law, and works to preserve the independence of the judiciary and legal profession worldwide.[1] Founded in 1995 under the Honorary Presidency of Nelson Mandela, the Institute now has more than 7,000 members worldwide.

The amicus does not seek to comment on the merits of any claims or defenses that Petitioners might raise in a hearing. Rather, its interest in the case is in encouraging this Court to recognize the fundamental, long-standing principle that domestic law should be interpreted in conformity with international law, where possible. By presenting its views in this brief, the amicus hopes to assist the Court in safeguarding the role of international law in United States law and fulfilling the expectations of other States based on entrenched international law.

Statement

Petitioners are detained at the U.S. Naval Base at Guantanamo Bay by U.S. armed forces. For over nineteen months, Petitioners have been imprisoned without

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[1] No counsel for a party authored this brief in whole or in part. This brief was prepared by the Human Rights Institute of the International Bar Association, and its counsel: Vaughan Lowe, Barrister, Essex Court Chambers, and Chichele Professor of Public International Law and a Fellow of All Souls College, University of Oxford; Guy S. Goodwin-Gill, Barrister, Blackstone Chambers, Senior Research Fellow of All Souls College and formerly Professor of International Refugee Law at the University of Oxford; and Allen & Overy, New York. No person other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief.

recourse to court process or access to counsel. Petitioners are citizens of the United Kingdom, Australia and Kuwait. Petitioners are not "enemy aliens," since they are citizens of friendly States, nor are they "enemy combatants," since the government has offered no evidence or grounds for such classification. *See Odah v. U.S.*, 321 F.3d 1134, 1138 (D.C. Cir. 2003).

The U.S. maintains exclusive authority and control over the Naval Base at Guantanamo Bay, which the U.S. occupies under a lease from the Government of Cuba. While Cuba retains "ultimate sovereignty," the U.S. has "control and jurisdiction" until both States agree otherwise. *Agreement Between the U.S. and Cuba for the Lease of Lands for Coaling and Naval Stations*, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

Protection against arbitrary detention is guaranteed by virtually every State's domestic laws, but it does not end at any one State's border. International law guarantees this fundamental right for any person detained under the authority and control of a State, regardless of whether the detention occurs within the State's sovereign territory. The guarantee applies in times of war, as well as peace.

Adherence to principles of international law in this case is particularly significant in light of the leadership role that the U.S. plays in world affairs. Friendly nations watch the U.S. with expectations based on widely accepted international law and shared legal traditions. Unfriendly nations look for an opportunity to accuse the U.S. of violating minimal standards of international law or to seize upon an American precedent to justify or obscure their own violations.

Summary of Argument

U.S. law should be interpreted so as to comply with obligations under international human rights law and international humanitarian law, especially where there is a broad consensus in the international community regarding a fundamental right.

International human rights law imposes an obligation on the U.S. to provide every person detained under its authority and control access to a court for the purpose of reviewing the lawfulness of his detention, regardless of whether the U.S. retains formal sovereignty over the location of the detention.

Under international humanitarian law, the U.S. is required to provide every person detained in connection with alleged involvement in an armed conflict with a prompt determination as to whether he is accorded "prisoner of war" status. Prolonged delay of this determination without access to counsel or judicial review results in arbitrary detention, contrary to both humanitarian and human rights law.

Argument

I. United States Law Should Comply with International Human Rights and Humanitarian Law

United States law should be interpreted so as to recognize the federal courts' jurisdiction to hear Petitioners.[2]

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[2] The amicus makes no comment on issues that split the lower courts as to whether, or how, an obligation that binds the U.S. as a matter of international law may create a private cause of action for its violation in federal courts under the Alien Tort Claims Act, 28 U.S.C. § 1350, or otherwise. *See, e.g., Odah*, 321 F.3d at 1145-1149 (Randolph J., concurring) (noting circuit split). The amicus simply urges the Court to respect international law in interpreting jurisdiction under

It is an accepted principle that domestic law should be interpreted in accordance with international obligations, where possible. This Court applied this principle in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and should likewise do so here.

A. The Rule in Favor of Harmony with International Law

The principle that domestic law should be interpreted so as to avoid violations of international obligations, where fairly possible, is well-established in the U.S. and other States. *See, e.g., Restatement (Third) of Foreign Relations Law of the United States* §§ 114-15 (1987); Ian Brownlie, *Principles of Public International Law*, 42-51 (4th ed. 1990).[3]

This Court has applied the principle of construction in favor of harmony with international law in a wide variety of cases. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 254-61 (1984) (finding air carrier's declared liability limit was consistent with an international air carriage treaty that the U.S. adhered to for 50 years and had not been repudiated); *Weinberger v. Rossi*, 456 U.S. 25, 29-30, 32-33 (1982) (looking to international law in interpreting statute that prohibited employment discrimination against U.S. citizens on military bases overseas unless permitted by

U.S. law, including the *habeas corpus* statute, 28 U.C.S. § 2241. *See Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980); *Beharry v. Ashcroft*, 183 F. Supp. 2d 584 (E.D.N.Y.), *rev'd on other grounds*, No. 98 CV 5381 (JBW), 2003 U.S. App. LEXIS 8279 (2d Cir. May 1, 2003).

[3] Even when deciding constitutional questions without any international dimension, this Court considers international law as a reflection of the "values that we share with a wider civilization." *Lawrence v. State*, 123 S. Ct. 2472, 2483 (2003); *see also Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002).

treaty); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (in maritime tort case, looking to law of nations in determining statutory construction of Jones Act); *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (in admiralty case, noting that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country"); *cf. McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963) (finding National Labor Relations Act did not apply to foreign vessels manned by alien crews because such laws "would raise considerable disturbance not only in the field of maritime law but in our international relations as well").

The rationale for interpreting domestic law in harmony with international law loses none of its force when a fundamental human right is involved. Indeed, the U.S. strives to enforce fundamental rights widely to the benefit of the world community, its allies, and its own citizens abroad. *See, e.g., Case Concerning U.S. Diplomatic and Consular Staff in Tehran*, (U.S. v. Iran) 1980 I.C.J. 3, at ¶¶ 23, 69 (May 24) (upholding claims of inhumane treatment of U.S. citizens). Expectations of other States based on international law should be fulfilled so as to foster goodwill among States and encourage compliance in the future. Particularly with respect to States with whom the U.S. shares a common history of commitment to the rule of law, expectations should not be lightly ignored.[4]

[4] For example, in *The Queen on the Application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] All E.R. (D) 70 (C.A. 2002), the English Court of Appeal declined to compel the British Secretary of State to make representations to the U.S. concerning the detainees at Guantanamo Bay, but

B. Applying *Johnson v. Eisentrager* Today

In holding that the U.S. courts lacked jurisdiction to hear Petitioners, the D.C. Circuit misinterpreted the principles set forth by this Court in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *See Odah v. U.S.*, 321 F.3d 1134, 1138-1145 (D.C. Cir. 2003).

In *Eisentrager*, this Court dismissed *habeas corpus* petitions by Germans who were convicted by a U.S. military tribunal in China shortly after the Second World War for violating the rules of war and were then repatriated to Germany to serve their sentences. *Johnson*, 339 U.S. at 765-66. Petitioners were "enemy aliens," since they were citizens of a State that was at war with the U.S. They argued, *inter alia*, that the military tribunal that convicted them lacked jurisdiction under international law. *Id.* at 785-90.

Justice Jackson, for the majority, reviewed all relevant sources of international law at the time, including treaties and customary international law. *Id.* at 786-90. He observed that petitioners had received all of the due process required under existing international law, including disclosure of the full particulars of their alleged war crimes and a trial before a military tribunal, at which other defendants were acquitted. *Id.* at 766, 786-90. Justice Jackson concluded that there was nothing about the

did so, in part based on its expectation that the U.S. would come into compliance with international law: "What appears to us to be objectionable is that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. . . . As is clear from our Judgment, we believe that the United States Courts have the same respect for human rights as our own." *Id.* at ¶¶ 66, 107.

prosecution of petitioners that had infringed their rights under international law. *Id.* at 789. Their detention was lawful under international law, which provided that prisoners of war could be detained until the end of war crimes proceedings and, if necessary, until the expiration of the punishment. *Id.*

Much has changed in international law in the half century since *Eisentrager* was decided, yet Justice Jackson's approach remains correct. The obligations of the U.S. under international law must be rigorously considered and robustly enforced by the courts, wherever possible. Here, the analysis involves international human rights law, which emerged after the Second World War, as well as advances in international humanitarian law.

II. International Human Rights Law Requires Access to a Court or Tribunal

Under international human rights law, the U.S. is bound by treaty and customary international law to grant detainees access to judicial review concerning the lawfulness of their detention. This obligation arises in Petitioners' case as a result of the authority and control that the U.S. exercises over Guantanamo Bay, regardless of whether the U.S. retains ultimate sovereignty.

A. The United States' Obligations Pursuant to Treaty and Customary International Law

Since its affirmation in the Magna Carta,[5] the right against arbitrary detention has held a venerable spot in the history of Anglo-American law, taking its place in

[5] "No free man shall be taken, imprisoned, disseised [dispossessed], outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." The Magna Carta, ch. 39 (1215).

the American Constitution through the Due Process Clause of the Fifth Amendment. U.S. Const. amend. V. Generations of statesmen have described this right as a feature that distinguishes civilized democracy from tyranny[6] and totalitarianism.[7] As the values of the rule of law and due process have spread, the right against arbitrary detention has been included in the constitutions of States around the world.

Following the Second World War, the prohibition against arbitrary detention has also become entrenched in international human rights law. The U.S. is bound to observe this right through its treaty obligations and customary international law.

The treaty obligations of the U.S. flow from the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, 368, which the U.S. ratified in 1992.[8] The ICCPR provides, in pertinent part:

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[6] In The Federalist No. 84, at 533, Alexander Hamilton quotes William Blackstone: "the practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument of tyranny. . .To bereave a man of life. . .without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny; but confinement of the person, by secretly hurrying him to jail, . . .is a less public, less striking, and therefore a more dangerous engine of arbitrary government."

[7] At the height of the Second World War, Sir Winston Churchill stated: "The power of the executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgement of his peers, is in the highest degree odious and is the foundation of all totalitarian government whether Nazi or Communist." Winston Churchill, Minute to the Home Secretary, 21 November 1943.

[8] The ICCPR has been ratified by 149 States. *See* I United Nations, *Multilateral Treaties Deposited with the Secretary General*, 164-65 (2003). The U.S. signed the ICCPR in 1977, and ratified it in 1992. *See Senate Resolution of Ratification of International Covenant*

> Article 9(1): Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law
>
> . . .
>
> Article 9(4): Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

As the plain language indicates, the essence of the prohibition against arbitrary detention is a right to judicial review.[9]

This right is also protected by customary international law, as reflected in a broad range of international instruments, decisions, commentaries and State practice. The Universal Declaration of Human Rights, which is recognized as an authoritative statement of customary inter-

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on Civil and Political Rights, 138 Cong. Rec. S 4781, *S4784, 102d Cong. (1992) (ratified Apr. 2, 1992). Congress, however, added a reservation that Articles 1 through 27 are not self-executing. *See* 138 Cong. Rec. at *S4784. In December 1998, President Clinton reinforced the commitment of the U.S. to protect and promote human rights under agreements to which it is a party, including the ICCPR. Exec. Order No. 13107, 63 Fed. Reg. 68991 (Dec. 10, 1998). The U.S. has not declared or communicated any derogation from its obligations under the ICCPR.

[9] *See, e.g., Vuolanne v. Finland*, No. 265/1987, Views of the Humans Rights Committee, CCPR/C/35/D/265/1987 at ¶9.6, 2 May 1989 (finding that review of petitioner's claim before a superior military officer lacked the "judicial character" of a court hearing, thus depriving petitioner of his right of recourse to a "court").

national law, contains the obligation to provide detainees with an opportunity to challenge their detention in court. Universal Declaration of Human Rights, Dec. 10, 1948, arts. 9-10, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810. This obligation is included in every other major international human rights convention which contains a general enumeration of rights.[10] There is also wide international practice in support of a principle akin to *habeas corpus* under international law.[11]

The consistency and weight of international practice is such that the distinguished authors of the Third Restatement assert that, as a matter of customary international law, a State violates international law if, as a matter of policy, it practices, encourages, or condones "prolonged

[10] *See, e.g.*, American Declaration of the Rights and Duties of Man, May 2, 1948, arts. XXV, XXVI, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) (expressing the obligations of members of the Organization of American States, including the U.S.); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5, 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 9, 999 U.N.T.S. 171, 6 I.L.M. 368; American Convention on Human Rights, Nov. 22, 1969, art. 7(5), 1144 U.N.T.S.123, 9 I.L.M. 673; African Charter on Human and People's Rights, June 27, 1981, arts. 6-7, 21 I.L.M. 58; *see also* African Commission Decisions in Communication Nos. 13/94, 139/94, 154/96, 161/97 (Saro-Wiwa v Nigeria) (holding that Article 6 prohibited arbitrary detention); 64/92 (Aleke Banda v. Malawi) (same).

[11] For example, the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly by Resolution 43/173 G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988), contains a requirement for judicial control (Principle 4), a right to legal assistance (Principle 17), a right to consult counsel (Principle 18) and a right to challenge the lawfulness of detention (Principle 32). The Body of Principles contains no provision for suspension of the guarantees in times of crisis.

arbitrary detention." *Restatement (Third) of Foreign Relations Law of the United States* §702, n.6 (1987).

B. The United States' Obligations Arise Through Authority and Control

Under international law, States are obliged to respect and protect the right against arbitrary detention whenever they exercise authority and control over a person, regardless of where the detainee is being held, and regardless of the detainee's nationality. Thus, this obligation applies to the U.S. in respect of Petitioners.

International tribunals consistently hold that the responsibility of a State to secure basic human rights established in international law for the benefit of individual persons does not hinge on the presence of such persons within the sovereign territory of the State, or their nationality, but rather on whether such persons are subject to the authority and control of the State. One of the fundamental purposes of the recognition of the right against arbitrary detention was to prevent abuse by States shifting the site of detention outside their borders, so as to avoid domestic laws. Consequently, Cuba's "ultimate sovereignty" over Guantanamo Bay is irrelevant under international law.

The reach of the prohibition against arbitrary detention under international law has been addressed in the context of the ICCPR and the American Declaration of the Rights and Duties of Man, both of which apply to and bind the U.S. *See* ICCPR, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory *and subject to its jurisdiction* the rights recognised in the present Covenant.") (emphasis added); American Declaration of the Rights and Duties of Man, May 2, 1948, arts. XXV, XXVI, *reprinted in* Basic Documents Pertaining to

Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

The United Nations Human Rights Committee, which is responsible for monitoring compliance with the ICCPR, determined that a State party may be held accountable for "violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it." *López Burgos v. Uruguay*, No.52/1979, Views of the Human Rights Committee, CCPR/C/13/D/52/1979 at ¶12.3, 29 July 1981 (finding petition concerning the kidnapping and detention of petitioner's husband by Uruguayan agents in Argentina admissible for review); *see also Casariego v. Uruguay*, No.56/1979, Views of the HRC, CCPR/C/13/D/56/1979 at ¶¶10.1-10.3, 29 July 1981 (where petitioner was arrested and detained incommunicado by Uruguayan agents in Brazil, holding that a State is "accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it"). The Committee further held that it would be "unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." *Burgos*, at ¶12.3.

Likewise, in interpreting the American Declaration of the Rights and Duties of Man, which the U.S. has conceded it is bound by, the Inter-American Commission on Human Rights determined that State Parties must secure the rights set out by the Declaration, regardless of where the State Party detains the petitioner. *See Coard v. United States*, Case 10.951, Inter-Am. C.H.R. Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. at 1283

(1999) at §§ 37, 39, 41 and 43 (where U.S. detained petitioners during military occupation in Grenada, noting that the U.S. conceded that it was bound by the Declaration, and holding that "the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether . . . the State observed the rights of a person subject to its authority and control").

In addition, throughout Europe, courts have held that a State is liable for acts of its agents even on another sovereign's territory. The European Commission and the European Court of Human Rights have interpreted "jurisdiction" under the European Convention on Human Rights as extending protection to individuals, regardless of their nationality, in places where they are subject to the actual control of agents of State Parties, even if those places are outside the territory of the State. *See Cyprus v. Turkey*, App. No. 8007/77, 13 DR 85 (1977) (holding that basic tenet of the Convention provides that States are "bound to secure the rights of all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad"); *see also Loizidou v. Turkey*, App. No. 14318/89, 23 Eur. H.R. Rep. 513 (1996); *Bankovic v. Belgium and 16 Other Contracting States*, App. No. 52207/99, 12 December 2001, 11 B.H.R.C. 435; *Ocalan v. Turkey*, App. No. 46221/99, 37 Eur. H.R. Rep. 10 (2003).

This approach to the extraterritorial reach of the duties of States is further reflected in the principles of international law concerning State responsibility. These affirm that a State is responsible for the conduct, *inter alia*, of persons or entities exercising elements of governmental authority, or acting on the instructions of, or under the direction or control of, that State. The criterion

is the link between the person said to have undertaken the conduct and the State in question. The nationality of the persons affected by the conduct, or their presence within the sovereign territory of the State in question, is immaterial. *See* United Nations International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 83, U.N. GAOR, 56th Sess., Supp. No. 10 and Corrigendum, U.N. Doc. A/56/83 (2001).

III. International Law Requires Due Process During Armed Conflict

On September 11, 2001, the U.S. was struck by terrorists, against whom it must continue to protect itself vigilantly. However, in international law there is no concept of a "war on terror," which releases States from their obligation to respect the right against arbitrary detention. International law governs all manner of detentions arising from violent conflicts, preserving a just balance between due process and compelling security interests.

The prohibition against arbitrary detention under international human rights law is not displaced by circumstances of armed conflict. In any event, similar due process rights for detainees apply under the "laws of war," also known as "international humanitarian law."

A. Obligations Under International Human Rights Law Continue During Armed Conflict

The obligation to respect the right against arbitrary detention under the ICCPR continues to apply in circumstances of military occupation and military rule. *See Legality of the Threat of Use of Nuclear Weapons*, (Advisory Opinion) 1996 I.C.J. 226, 240 (June 24) (holding that "the protection of the [ICCPR] does not

cease in times of war, except . . . [where] certain provisions may be derogated from in a time of national emergency"); *see also* Concluding Observations of The United Nations Human Rights Committee, 63rd Sess., CCPR/C/79/Add.93 at ¶10 (1998) (holding Covenant applicable where State exercises "effective control").

International human rights tribunals have held that, even where national security is involved, administrative hearings without the benefit of counsel do not meet the requisite standard of judicial or quasi-judicial review. For instance, the European Court of Human Rights held that a person detained pending deportation for security reasons was deprived of his right to judicial review, where he had a hearing before an advisory panel but was denied legal representation and was given only an outline of the grounds for his deportation. *See Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413 (1997).

B. International Humanitarian Law Requires Due Process During Armed Conflict

An overriding objective of international humanitarian law, or the laws of war, is to ensure that every detainee is assigned a status in order that he may receive rights and privileges appropriate for his status. As it stands, Petitioners find themselves in precisely the sort of "legal black hole" that international humanitarian law aims to seal off.

The U.S., along with 190 other States, has ratified both the 1949 Convention Relating to the Treatment of Prisoners of War ("P.O.W. Convention"), Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, and the 1949 Convention Relating to the Protection of Civilian Persons in Time of War ("Civilian Convention"), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, which apply to "all cases of

declared war or any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them." P.O.W. Convention, art. 2; Civilian Convention, art. 2; *see also Legality of the Threat of Use of Nuclear Weapons*, 1996 I.C.J, 226, 257 (Advisory Opinion) (holding the terms of the Conventions binding as a matter of customary international law, since the rights they protect are so "fundamental" as to be "intransgressible").

The Conventions have been supplemented by two additional protocols, which, like the Conventions, are regarded as part of customary international law and have been followed by the U.S. in its regulations and in previous conflicts.[12]

The Conventions provide for the protection of persons detained in circumstances of armed conflict, either as prisoners of war entitled to the benefits of the P.O.W. Convention or as civilian detainees protected under the Civilian Convention. *See* P.O.W. Convention, art. 5; Civilian Convention, arts. 71-76, 132, 133; *see also* 4 International Committee of the Red Cross, *Commentary on the Geneva Conventions of 12 August 1949* (1958)

[12] In its *Operational Law Handbook*, the Judge Advocate General's School, U.S. Army, states "that the US views [among others, Articles 45 and 75 of the First Additional Protocol] as customary international law." Judge Advocate General's School, U.S. Army, *Operational Law Handbook*, JA 422 at 18-2 (1997). This statement is qualified in the 2002 edition of *Operational Law Handbook*, in which it is now said that the U.S. views Article 45 of the First Additional Protocol as "customary international law or acceptable practice though not legally binding." Judge Advocate General's School, U.S. Army, *Operational Law Handbook*, Ch. 2 (2002). However, there is no evidence to suggest, and none is offered, that customary international law has changed in this way since 1997. *See* Michael J. Matheson, Remarks, *The U.S. Position on the Relation of Customary Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U.J. Int'l L. & Pol'y 419, 427 (1987).

("Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Geneva Convention, a civilian covered by the Fourth Geneva Convention. . . there is no intermediate status; nobody in enemy hands can be outside of the law."). Any detainee claiming the status of prisoner of war or appearing to be so entitled is presumed to be a prisoner of war, and retains that status until such time as his status has been determined by a competent tribunal. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("First Additional Protocol"), art. 45, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977). Furthermore, any detainee not falling under the P.O.W. Convention or the Civilian Convention, such as an "unlawful combatant," is entitled to the benefits of Article 75 of the Additional Protocol, which guarantees humane treatment and due process before a court for any penal proceedings. *See* First Additional Protocol, art. 75.

During the Vietnam War, the U.S. Military Assistance Command issued comprehensive criteria for the classification and disposition of detainees, providing for the systematic classification of detainees into "prisoner of war" and "non-prisoner of war" categories. *See* Military Assistance Command Vietnam, *Directive Number 381-46*, Annx. A, (27 December 1967). Extensive provision was made for due process in the determination of eligibility for prisoner of war status in cases of "non-prisoners of war and doubtful cases who are captured by or are in the custody of U.S. forces." *See* Military Assistance Command Vietnam, *Directive Number 20-5*, (15 March 1968). In particular, the military laid down the principle that, "[t]he Detainee shall have the right to be present with his counsel at all open sessions of the tribunal," required time with counsel, free access by coun-

sel and interviews in private, opportunity to confer with essential witnesses and rights of cross-examination. *Id.*

The treatment of Petitioners in this case is a marked departure from the procedures mandated by international humanitarian law and followed by the U.S. in the past.

First, the U.S. has not acknowledged or determined Petitioners' status as "prisoners of war." This is contrary to the presumption of "prisoner of war" status under the First Additional Protocol, which may only be displaced through due process in a competent tribunal. *See* First Additional Protocol, arts. 45(1)-(2). Additionally, "prisoners of war" status entitles Petitioners to a host of rights and privileges specified under the P.O.W. Convention.

Further, because Petitioners have not been given status in accordance with the Conventions and additional protocols, there is no framework in which to ensure they are not detained any longer than permitted or justified under international law. Under Article 132 of the P.O.W. Convention, prisoners of war must be released upon the cessation of hostilities. The Civilian Convention contains an analogous provision ensuring the release of civilians detained in circumstances of armed conflict (on narrow permissible grounds, such as "definite suspicion" of hostile activity) when the reasons which necessitated their internment no longer exist. *See* Civilian Convention, art. 132.

Moreover, if the U.S. intends to bring any penal proceedings against Petitioners, they are entitled to legal representation and a hearing before a judicial tribunal. Article 75 of the First Additional Protocol, recognized as customary international law, provides that detainees are entitled to the rights of defense, including assistance by a qualified advocate or counsel "who shall be able to visit them freely and shall enjoy the necessary facilities

for preparing the defence." First Additional Protocol, Art. 75(4)(a). Further, the Geneva Conventions protect detainees against "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." P.O.W. Convention, art. 3; Civilian Convention, art. 3; *see also* First Additional Protocol, art. 75 ("No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.").

Finally, it has been suggested that detainees in Guantanamo are "unlawful combatants." This classification was not used by the D.C. Circuit Court in characterizing Petitioners' status and it does not appear in either international human rights law or international humanitarian law. Nevertheless, even if Petitioners were labelled by the government as "unlawful combatants," they would still be entitled to due process rights under Article 3 of all four Geneva Conventions and Article 75 of the First Additional Protocol.

Conclusion

The prohibition against arbitrary detention is a fundamental principle of international law that applies whenever a State exercises authority and control, and applies in times of war as well as peace. The present detention of Petitioners is inconsistent with this basic human right. U.S. law should be interpreted to conform with obligations under international law, preserving the role of the U.S. as a leader in the advancement of ordered liberty, and meeting the expectations of fellow enlightened democracies.

Respectfully submitted,*

Pamela Rogers Chepiga
Counsel of Record
Andrew B. Matheson
Karen Lee
Nathan Reilly
ALLEN & OVERY
1221 Avenue of the Americas
New York, New York 10020
(212) 610-6300

Attorneys for Amicus Curiae

October 3, 2003

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* Submitted and filed with consent of all parties.

(7) (8)

No. 03-334, 03-343, 03-6696

Supreme Court, U.S.
FILED
OCT 3 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

KHALED A. F. AL ODAH, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

SHAFIQ RASUL, et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

YASIR ESAM HAMDI,

Petitioner,

v.

DONALD RUMSFELD,

Respondent.

On Petitions For Writs Of Certiorari To The United States Courts Of Appeals For The District Of Columbia Circuit And The Fourth Circuit

BRIEF OF AMICUS CURIAE FRED KOREMATSU IN SUPPORT OF PETITIONERS

GEOFFREY R. STONE
DAVID A. STRAUSS*
1111 East 60th Street
Chicago, IL 60637
(773) 702-4907

STEPHEN J. SCHULHOFER
40 Washington Sq. So.
New York, NY 10012

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

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INTEREST OF *AMICUS CURIAE*[1]

More than sixty years ago, as a young man, Fred Korematsu challenged the constitutionality of President Franklin Roosevelt's 1942 Executive Order that authorized the internment of all persons of Japanese ancestry on the West Coast of the United States. He was convicted and sent to prison. In *Korematsu v. United States*,[2] this Court upheld his conviction, explaining that because the United States was at war the government could constitutionally intern Mr. Korematsu, without a hearing, and without any adjudicative determination that he had done anything wrong.

More than half-a-century later, Fred Korematsu was awarded the Presidential Medal of Freedom, the nation's highest civilian honor, for his courage and persistence in opposing injustice. In accepting this award, Mr. Korematsu reminded the nation that "We should be vigilant to make sure this will never happen again." He has committed himself to ensuring that Americans do not forget the lessons of their own history.

Because Mr. Korematsu has a distinctive, indeed, unique, perspective on the issues presented by this case, he submits this brief to assist the Court in its deliberations.

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief. Filing and printing costs were paid by the MacArthur Justice Center at The University of Chicago Law School.

[2] 323 U.S. 214 (1944).

SUMMARY OF ARGUMENT

Petitioners in these cases have been deprived of their liberty for extended periods of time without any opportunity for a fair hearing before a competent tribunal to determine whether there is any factual or legal basis for their confinement and without any assistance of counsel. Unlike Fred Korematsu, who was at least permitted to challenge in court the constitutionality of his internment, the Petitioners have been denied even that fundamental right. The United States insists that this denial of even minimal due process is constitutional and federal courts lack jurisdiction to review that determination because the United States is at war.

Although the specific legal issues presented in these cases differ from those the United States has faced in the past, the extreme nature of the government's position is all-too-familiar. It may be that it is essential in some circumstances to compromise civil liberties in order to meet the necessities of wartime, but history teaches that we tend too quickly to sacrifice these liberties in the face of overbroad claims of military necessity. Fred Korematsu's experience is but one example, of many.

In this instance, the claim, accepted in effect by the courts below, that the government may detain individuals indefinitely without any fair hearing overreaches the bounds of military necessity. To avoid repeating the mistakes of the past, this Court should make clear that the United States respects fundamental constitutional and human rights – even in time of war.

ARGUMENT

Since September 11th, the United States has taken significant steps to ensure the nation's safety. It is only natural that in times of crisis our government should

tighten the measures it ordinarily takes to preserve our security. But we know from long experience that we often react too harshly in circumstances of felt necessity and underestimate the damage to civil liberties. Typically, we come later to regret our excesses, but for many that recognition comes too late. The challenge is to identify excess when it occurs and to protect constitutional rights before they are compromised unnecessarily. These cases provide the Court with the opportunity to protect constitutional liberties when they matter most, rather than belatedly, years after the fact.

As Fred Korematsu's life story demonstrates, our history merits attention. Only by understanding the errors of the past can we do better in the present. Six examples illustrate the nature and magnitude of the challenge: the Alien and Sedition Acts of 1798, the suspension of habeas corpus during the Civil War, the prosecution of dissenters during World War I, the Red Scare of 1919-1920, the internment of 120,000 individuals of Japanese descent during World War II, and the era of loyalty oaths and McCarthyism during the Cold War.

I. TIME AND AGAIN, IN PERIODS OF REAL OR PERCEIVED CRISIS, THE UNITED STATES HAS UNNECESSARILY RESTRICTED CIVIL LIBERTIES

History teaches that, in time of war, we have often sacrificed fundamental freedoms *unnecessarily*. The Executive and Legislative Branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and failed to consider alternative ways to protect the national security. Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated

claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored. In retrospect, it is clear that judges and justices should have scrutinized these claims more closely and done more to ensure that essential security measures did not unnecessarily impair individual freedoms and the traditional separation of powers.

A. THE ALIEN AND SEDITION ACTS OF 1798

In 1798, the United States found itself embroiled in a European war that then raged between France and England. A bitter political and philosophical debate divided the Federalists, who favored the English, and the Republicans, who favored the French. The Federalists were then in power, and the administration of President John Adams initiated a sweeping series of defense measures that brought the United States into a state of undeclared war with France.[3]

The Republicans opposed these measures, leading Federalists to accuse them of disloyalty. President Adams, for example, declared that the Republicans "would sink the glory of our country and prostrate her liberties at the feet of France."[4] Against this backdrop, and in a mood of patriotic fervor, the Federalists enacted the Alien and Sedition Acts of 1798.

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[3] James Rogers Sharp, *American Politics in the Early Republic: The New Nation in Crisis* 5 (New Haven: Yale, 1993); Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* 195 (New York: Free Press, 1975).

[4] Letter from John Adams to the Inhabitants of Arlington and Bandgate, Vermont, June 25, 1798, in Charles Francis Adams, ed., 9 *The Words of John Adams* 202 (Boston: Little, Brown, 1854).

The Alien Friends Act empowered the President to deport any non-citizen he judged to be dangerous to the peace and safety of the United States. The Act applied to citizens or subjects of nations with whom we were not in a state of declared war. The Act accorded individuals detained under the Act no right to a hearing, no right to present evidence and no right to judicial review.[5] Congressman Edward Livington aptly observed in opposition to the Act that with "no indictment; no jury; no trial; no public procedure; no statement of the accusation; no examination of the witnesses in its support; no counsel for defence; all is darkness, silence, mystery, and suspicion."[6] The Alien Friends Act expired on the final day of President Adams's term of office, and has never been renewed.

The Sedition Act of 1798 prohibited criticism of the government, the Congress or the President, with the intent to bring them into contempt or disrepute.[7] The Act was vigorously enforced, but only against supporters of the Republican Party. Prosecutions were brought against every influential Republican newspaper and the most vocal critics of the Adams administration.[8]

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[5] *See* An Act Concerning Aliens, 5th Cong., 2d Sess., in 1 *The Public Statutes at Large of the United States of America* 570-72 (Boston: Little, Brown, 1845). The Alien Enemies Act, which was adopted at the same time, provided that, in the case of a declared war, citizens or subjects of an enemy nation residing in the United States could be apprehended, detained and either confined or expelled at the direction of the President. This Act has remained a permanent part of American wartime policy.

[6] 8 *Annals of Congress* 2006-11 (Gales and Seaton 1851).

[7] *See* An Act for the Punishment of Certain Crimes against the United States, 5th Cong., 2d Sess., in 1 *Public Statutes at Large* 596-97.

[8] *See* John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Boston: Little, Brown, 1951); James Morton Smith, *Freedom's*

(Continued on following page)

The Sedition Act also expired on the last day of Adams's term of office. The new President, Thomas Jefferson, pardoned those who had been convicted under the Act, and forty years later Congress repaid all the fines.[9] The Sedition Act was a critical factor in the demise of the Federalist Party, and the Supreme Court has often reminded us in the years since that the Sedition Act of 1798 has been judged unconstitutional in the "court of history."[10]

B. THE CIVIL WAR: THE SUSPENSION OF *HABEAS CORPUS*

During the Civil War, the nation faced its most serious challenge. There were sharply divided loyalties, fluid military and political boundaries, and easy opportunities for espionage and sabotage. In such circumstances, and in the face of widespread and often bitter opposition to the war, the draft and the Emancipation Proclamation, President Lincoln had to balance the conflicting interests of military necessity and individual liberty.

During the course of the war, Lincoln suspended the writ of *habeas corpus* on eight separate occasions. Some of these orders were more warranted than others. The most extreme of the suspensions, which applied throughout the entire nation, declared that "all persons . . . guilty of any disloyal practice . . . shall be subject to court martial."[11]

Fetters: The Alien and Sedition Laws and American Civil Liberties (Ithaca: Cornell University Press, 1956).

[9] Cong. Globe, 26th Cong, 1st Sess. 411 (May 23, 1840). *See* 26th Cong., 1st Sess., Doc. 86, House Rep.

[10] *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

[11] Roy P. Basler, ed., 5 *The Collected Works of Abraham Lincoln* 436-437 (New Brunswick, N.J.: Rutgers University Press, 1956).

Under this authority, military officers arrested and imprisoned as many as 38,000 civilians, with no judicial proceedings and no judicial review.[12]

In 1866, a year after the war ended, the Supreme Court ruled in *Ex parte Milligan*[13] that Lincoln had exceeded his constitutional authority, and held that the President could not constitutionally suspend the writ of *habeas corpus*, even in time of war, if the ordinary civil courts were open and functioning. As Chief Justice Rehnquist has observed, *Milligan* "is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime."[14]

C. WORLD WAR I: THE ESPIONAGE ACT OF 1917

When the United States entered World War I, there was widespread opposition to both the war and the draft. Many citizens argued that our goal was not to "make the world safe for democracy," but to protect the investments of the wealthy, and that this cause was not worth the life of one American soldier.

President Wilson had little patience for such dissent. He warned that disloyalty "must be crushed out" of

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[12] *See* Daniel Farber, *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York and Oxford: Oxford University Press, 1991); William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998).

[13] 4 Wall. (71 U.S.) 2 (1866).

[14] William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 137 (New York: Vintage Books, 1998).

existence[15] and declared that disloyalty "was ... not a subject on which there was room for ... debate." Disloyal individuals, he explained, "had sacrificed their right to civil liberties."[16]

Shortly after the United States entered the war, Congress enacted the Espionage Act of 1917.[17] Although the Act was not directed at dissent as such, aggressive federal prosecutors and compliant federal judges soon transformed the Act into a blanket prohibition of seditious utterance.[18] The Wilson administration's intent was made clear in November 1917 when Attorney General Charles Gregory, referring to war dissenters, announced: "May God have mercy on them, for they need expect none from an outraged people and an avenging government."[19]

In fact, the government worked hard to create an "outraged people." Because there had been no direct attack on the United States, and no direct threat to our national security, the Wilson administration had to generate a sense of urgency and a mood of anger in order to exhort Americans to enlist, to contribute money, and to make the many sacrifices that war demands. To this end, Wilson established the Committee for Public Information, which

[15] Woodrow Wilson, "Third Annual Message to Congress," quoted in David M. Kennedy, *Over Here: The First World War and American Society* 24 (New York: Oxford University Press, 1980).

[16] Quoted in Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 53 (New York: Norton, 1979).

[17] Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 219.

[18] *See* Geoffrey R. Stone, *Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. Chi. L. Rev. 335 (2003); Geoffrey R. Stone, *The Origins of the "Bad Tendency Test": Free Speech in Wartime*, 2003 Sup. Ct. Rev. 411

[19] New York Times 3 (Nov. 21, 1917).

produced a flood of inflammatory and often misleading pamphlets, news releases, speeches, editorials, and motion pictures, all designed to instill a hatred of all things German and of all persons whose "loyalty" might be open to doubt.[20]

The government prosecuted more than 2,000 dissenters for expressing their opposition to the war or the draft, and in an atmosphere of fear, hysteria and clamor, most judges were quick to mete out severe punishment – often 10 to 20 years in prison – to those deemed disloyal. The result was the suppression of all genuine debate about the merits, morality and progress of the war.[21] But even this was not enough. Less than a year after adopting the Espionage Act, Congress enacted the Sedition Act of 1918, which declared it unlawful for any person to publish any disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government, the Constitution, or the flag of the United States.[22]

The story of the Supreme Court in this era is too familiar, and too painful, to bear repeating in detail. In a series of decisions in 1919 and 1920 – most notably *Schenck*,[23] *Debs*,[24] and *Abrams*[25] – the Court consistently upheld the convictions of individuals who had agitated against the war and the draft – individuals as obscure as

[20] *See* Harry N. Scheiber, *The Wilson Administration and Civil Liberties: 1917-1921* 16-17 (Ithaca: Cornell University Press, 1960).

[21] *See* Zechariah Chafee, *Free Speech in the United States* 52 (Cambridge: Harvard University Press, 1941)

[22] Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553.

[23] *Schenck v. United States*, 249 U.S. 47 (1919).

[24] *Debs v. United States*, 249 U.S. 211 (1919).

[25] *Abrams v. United States*, 250 U.S. 616 (1919).

Mollie Steimer, a twenty-year-old Russian-Jewish émigré who had thrown anti-war leaflets written in Yiddish from a rooftop on the lower East Side of New York, and as prominent as Eugene Debs, who had received almost a million votes in 1912 as the Socialist Party candidate for President. As Harry Kalven once observed, the Court's performance was "simply wretched."[26]

In December 1920, after all the dust had settled, Congress quietly repealed the Sedition Act of 1918.[27] Between 1919 and 1923, the government released from prison every individual who had been convicted under the Espionage and Sedition Acts. A decade later, President Roosevelt granted amnesty to all of these individuals, restoring their full political and civil rights. Over the next half-century, the Supreme Court overruled every one of its World War I decisions, implicitly acknowledging that the individuals who had been imprisoned for their dissent in this era had been punished for speech that should have been protected by the First Amendment.[28]

D. THE RED SCARE: 1919-1920

The Russian Revolution generated deep anxiety in the United States. A series of violent strikes and spectacular bombings triggered the period of public paranoia that became known as the "Red Scare" of 1919-1920. Attorney General A. Mitchell Palmer announced that the bombings

[26] Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 147 (New York: Harper & Row, 1988).

[27] Cong. Rec. 66th Cong., 2d Sess. 293-94 (Dec. 13, 1920).

[28] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

were an "attempt on the part of radical elements to rule the country."[29]

Palmer established the "General Intelligence Division" within the Bureau of Investigation and appointed J. Edgar Hoover to gather and coordinate information about radical activities. The GID unleashed a horde of undercover agents to infiltrate radical organizations. From November 1919 to January 1920, the GID conducted a series of raids in thirty-three cities. More than 5,000 people were arrested on suspicion of radicalism. Attorney General Palmer described the "alien filth" captured in these raids as creatures with "sly and crafty eyes, lopsided faces, sloping brows and misshapen features" whose minds were tainted by "cupidity, cruelty, and crime."[30] More than a thousand individuals were summarily deported.

In the spring of 1920, a group of distinguished lawyers and law professors, including Ernst Freund, Felix Frankfurter and Roscoe Pound, published a report on the activities of the Department of Justice, which carefully documented that the government had acted without legal authorization and without complying with the minimum standards of due process.[31] This report marked the beginning of the end of this era. As the *Christian Science Monitor* observed in June 1920, "in the light of what is now known, it seems clear that what appeared to be an excess

[29] Quoted in Robert K. Murray, *Red Scare: A Study in National Hysteria, 1919-1920*, 9 (New York: McGraw-Hill, 1955).

[30] "Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others," Hearings before the Comm. on Rules, House of Representatives 27 (1920).

[31] See National Popular Government League, *Report upon the Illegal Practices of the United States Department of Justice* (1920).

of radicalism" was met with a real "excess of suppression."[32] In 1924, Attorney General Harlan Fiske Stone ordered an end to the Bureau of Investigation's surveillance of political radicals. "A secret police," he explained, is "a menace to free government and free institutions."[33]

E. WORLD WAR II: INTERNMENT

On December 7, 1941, Japan attacked Pearl Harbor. Two months later, on February 19, 1942, President Roosevelt signed Executive Order 9066, which authorized the Army to "designate military areas" from which "any persons may be excluded."[34] Although the words "Japanese" or "Japanese American" never appeared in the Order, it was understood to apply only to persons of Japanese ancestry.

Over the next eight months, 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon and Arizona. Two-thirds of these individuals were American citizens, representing almost 90% of all Japanese-Americans. No charges were brought against these individuals; there were no hearings; they did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them. Many families lost everything.

[32] Christian Science Monitor (June 25, 1920).

[33] Quoted in Max Lowenthal, *The Federal Bureau of Investigation* 298 (New York: Sloane, 1950).

[34] Executive Order No. 9066, 7 Fed. Reg. 1407 (1942). On March 21, 1942, Congress implicitly ratified the Executive Order by providing that violation of the order of a military commander was unlawful. Act of June 25, 1948, ch. 645, 62 Stat. 765 (codified as 18 U.S.C. § 1383) (1974) (repealed 1976).

On the orders of military police, these individuals were transported to one of ten internment camps, which were located in isolated areas in wind-swept deserts or vast swamp lands. Men, women and children were placed in overcrowded rooms with no furniture other than cots. They found themselves surrounded by barbed wire and military police, and there they remained for three years.[35]

In *Korematsu v. United States*,[36] this Court, in a six-to-three decision, upheld the President's action. The Court offered the following explanation:[37]

> [We] are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. . . .
>
> Korematsu was not excluded from the [West Coast] because of hostility to . . . his race, [but] because . . . the military authorities . . . decided that the [] urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area]. . . . We cannot – by availing ourselves of the calm perspective of hindsight – say that these actions were unjustified.

On February 19, 1976, as part of the celebration of the Bicentennial of the Constitution, President Gerald Ford

[35] See Report of the Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (Washington D.C.: Government Printing Office, June 1983); Tetsuden Kashima, *Judgment without Trial: Japanese American Imprisonment during World War II* (Seattle: University of Washington Press, 2003).

[36] 323 U.S. 214 (1944). See also *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding the constitutionality of the curfew order); *Yasui v. United States*, 320 U.S. 114 (1943) (same).

[37] 323 U.S. at 219-20, 223-24.

issued Presidential Proclamation 4417, in which he acknowledged that, in the spirit of celebrating our Constitution, we must recognize "our national mistakes as well as our national achievements." "February 19th," he noted, "is the anniversary of a sad day in American history," for it was "on that date in 1942 . . . that Executive Order 9066 was issued." President Ford observed that "we now know what we should have known then" – that the evacuation and internment of these individuals was "wrong." Ford concluded by calling "upon the American people to affirm with me this American Promise – that we have learned from the tragedy of that long-ago experience" and "resolve that this kind of action shall never again be repeated."[38]

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to review the implementation of Executive Order 9066. The Commission was composed of former members of Congress, the Supreme Court and the Cabinet, as well as distinguished private citizens. In 1983, the Commission unanimously concluded that the factors that shaped the internment decision "were race prejudice, war hysteria and a failure of political leadership," rather than military necessity.[39]

Shortly thereafter, lower federal courts granted extraordinary writs of *coram nobis* in the *Korematsu* and *Hirabayashi* cases, finding that government officials had known at the time of the internment decision that there

[38] Presidential Proclamation 4417, "An American Promise," February 19, 1976, quoted in Eric K. Yamamoto, et al., *Race, Rights and Reparation: Law and the Japanese American Internment* 400 (Gaithersburg, Md.: Aspen, 2001).

[39] Report of the Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 5, 8 (Washington D.C.: Government Printing Office, June 1983).

had been no military necessity and that government officials had intentionally deceived the Supreme Court about this state of affairs.[40]

In vacating Fred Korematsu's forty-year-old conviction because it was the result of "manifest injustice," Federal District Judge Marilyn Hall Patel emphasized the need for both executive branch accountability and careful judicial review:[41]

> [*Korematsu*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability . . . .

In 1988, President Reagan signed the Civil Liberties Restoration Act, which officially declared the Japanese internment a "grave injustice" that had been "carried out without adequate security reasons," and offered a formal presidential apology and reparations to each of the Japanese-American internees who had suffered discrimination, loss of liberty, loss of property, and personal humiliation because of the actions of the United States government.[42] This Court's decision in *Korematsu* has become a constitutional pariah.

[40] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). Gordon Hirabayashi also successfully filed a petition for a writ of *coram nobis*. *See Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). *See also* Eric K. Yamamoto and Susan Kiyomi Serrano, *The Loaded Weapon*, 29 Amerasia Journal 51 (2002).

[41] *Korematsu*, 584 F. Supp. at 1420.

[42] 102 Stat. 903, Public Law 100-383 (Aug. 10, 1988) (codified at 50 U.S.C. § 1989(b)) (1996).

The Supreme Court has never cited it with approval of its result.[43]

F. THE COLD WAR: LOYALTY OATHS AND MCCARTHYISM

As World War II drew to a close, the nation moved almost seamlessly into the Cold War. With the glow of our wartime alliance with the Soviet Union evaporating, President Truman came under increasing attack by those who sought to exploit fears of Communist aggression. The issue of "loyalty" quickly became a shuttlecock of party politics. By 1948, President Truman was boasting on the stump that he had imposed on the federal civil service the most extreme loyalty program in the "Free World."[44]

But there were limits to Truman's anti-communism. In 1950, he vetoed the McCarren Act, which required the registration of all Communists. Truman explained that the Act was the product of "public hysteria" and would lead to "witch hunts."[45] Congress passed the Act over Truman's veto.[46]

In 1954, Congress enacted the Communist Control Act,[47] which stripped the Communist Party of "all rights, privileges, and immunities." Only one Senator, Estes

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[43] *See* Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 Sup. Ct. Rev. 455, 485 n 99.

[44] See David Caute, *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* 15-33 (New York: Simon and Schuster 1978).

[45] New York Times (Sept. 21, 1950).

[46] 64 Stat. 987, 50 U.S.C. § 67.

[47] 68 Stat. 775, 50 U.S.C. § 841.

Kefauver, dared to vote against it. Irving Howe lamented "this Congressional stampede to . . . trample . . . liberty in the name of destroying its enemy."[48]

Hysteria over the "Red Menace" swept the nation and generated a wide range of federal, state and local restrictions on free expression and free association, including extensive loyalty programs for government employees; emergency detention plans for alleged "subversives"; abusive legislative investigations designed to punish by exposure; public and private blacklists of those who had been "exposed"; and criminal prosecutions of the leaders and members of the Communist Party of the United States.[49]

This Court's response was mixed. The key decision was *Dennis v. United States*,[50] which involved the direct prosecution under the Smith Act of the leaders of the American Communist Party. The Court held that the defendants could constitutionally be punished for their speech under the clear and present danger standard – even though the danger was neither clear nor present. It was a memorable feat of judicial legerdemain.[51]

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[48] Irving Howe, "The Shame of U.S. Liberalism," 1 Dissent 308 (Autumn, 1954).

[49] *See generally* Ralph S. Brown, *Loyalty and Security* (New Haven: Yale University Press, 1958); Caute, supra note 43; Frank Donner, *The Age of Surveillance: The Aims and Methods of America's Political Intelligence System* (New York: Alfred A. Knopf, 1980); Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978).

[50] 341 U.S. 494 (1951).

[51] See Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 211 (New York: Harper & Row, 1988); William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 Sup. Ct. Rev. 375.

Over the next several years, the Court upheld far-reaching legislative investigations of "subversive" organizations and individuals and the exclusion of members of the Communist Party from the bar, the ballot and public employment.[52] In so doing, the Court clearly put its stamp of approval on an array of actions we look back on today as models of McCarthyism. In later years, the Court effectively overruled *Dennis* and its progeny, recognizing once again that the nation had been led astray by the emotions and fears of the moment.[53]

II. TO AVOID A REPETITION OF PAST MISTAKES, THIS COURT SHOULD CLOSELY SCRUTINIZE THE GOVERNMENT'S CLAIMS OF "MILITARY NECESSITY" IN THESE CASES TO ENSURE THAT CIVIL LIBERTIES ARE NOT UNNECESSARILY RESTRICTED

As in past episodes, the issues raised in these cases involve a direct conflict between our most precious civil liberties and a threat to our safety and security. That we have made mistakes in the past does not mean we should make mistakes in the present. We should learn from our experience.

During World War I, John Lord O'Brian served as Special Assistant Attorney General in charge of the War

[52] *See, e.g, Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952); *Barenblatt v. United States*, 360 U.S. 109 (1949).

[53] *See, e.g., Yates v. United States*, 354 U.S. 298 (1957) (narrowly construing the Smith Act); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (rejecting the *Dennis* version of clear and present danger); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (holding unconstitutional anti-Communist loyalty oath for public employees).

Emergency Division of the Department of Justice. In this capacity, he played a central role in enforcing the Espionage Act of 1917. Four decades later, reflecting on his own experience, O'Brian cautioned against the "emotional excitement engendered . . . during a war," and warned that "the greatest danger to our institutions" may rest, not in the threat of subversion, but "in our own weaknesses in yielding" to wartime anxiety and our "readiness to . . . disregard the fundamental rights of the individual." He expressed the hope that "our judges will in the end establish principles reaffirming" our nation's commitment to civil liberties.[54]

As Chief Justice Rehnquist has written, "[i]t is all too easy to slide from a case of genuine military necessity . . . to one where the threat is not critical and the power [sought to be exercised is] either dubious or nonexistent."[55] It is, he added, "both desirable and likely that more careful attention will be paid by the courts to the . . . government's claims of necessity as a basis for curtailing civil liberty."[56]

This Court has a profound responsibility to help guide our nation in the extraordinary circumstances of wartime. It has been said that in such circumstances the Court may grant too much deference to the other branches of government to avoid inadvertently hindering the war effort.[57] *Korematsu* and *Dennis* are examples of this phenomenon.

[54] John Lord O'Brian, *New Encroachments on Individual Freedom*, 66 Harv. L. Rev. 1, 3-4, 26 (1952). *See* John Lord O'Brian, *Changing Attitudes toward Freedom*, 9 Wash. & Lee L. Rev. 157 (1952).

[55] Rehnquist, supra note 12, at 224.

[56] *Id.*, at 225.

[57] *See id.*, at 222.

But the lesson of those decisions is not that this Court should abdicate its responsibility. It is, rather, that the Court should bring to its responsibility an even deeper commitment to preserving the liberties for which this nation has fought. The Court's confident exercise of that responsibility is essential to enabling our nation to strike the *right* balance in times of crisis.

This Court should make clear that the United States adheres to the rule of law even in wartime, and that even in wartime the United States respects the principle that individuals may not be deprived of their liberty except for appropriate justifications that are demonstrated in fair hearings, in which they can be tested with the assistance of counsel.

This Court should make clear that, even in wartime, the United States does not abandon fundamental liberties in the absence of convincing military necessity. Our failure to hold ourselves to this standard in the past has led to many of our most painful episodes as a nation. We should not make that mistake again.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

GEOFFREY R. STONE
DAVID A. STRAUSS
STEPHEN J. SCHULHOFER

Supreme Court, U.S.
FILED
OCT 3 _ 2003
OFFICE OF THE CLERK

Nos. 03-334, 03-343

In the Supreme Court of the United States

SHAFIQ RASUL, ET AL.,
Petitioners,
v.
GEORGE W. BUSH, ET AL.,
Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Petitioners,
v.
UNITED STATES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF RETIRED MILITARY OFFICERS IN SUPPORT OF PETITIONERS

MIRNA ADJAMI
Midwest Immigrant and Human Rights Center
208 South LaSalle St.
Chicago, IL 60603
(312) 660-1330

JAMES C. SCHROEDER
Counsel of Record
GARY A. ISAAC
STEPHEN J. KANE
JON M. JUENGER
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle St.
Chicago, IL 60603
(312) 782-0600

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are three retired military officers. Each one formerly served as the Judge Advocate General or the senior legal advisor for a branch of the United States military, and has extensive experience with U.S. military regulations and the Laws of War. Each dedicated his military career to the principle that the mission of the nation's Armed Forces must be consistent with the rule of law.

The principal purpose of this brief is to explain to the Court the profound ramifications, from a military point of view, of the government's position that no court can decide whether foreign prisoners at the United States Naval Base at Guantanamo Bay, Cuba may be held there without any charges being brought against them and without being afforded a hearing by a "competent tribunal" to determine their status, as required by U.S. military regulations and the Geneva Conventions of 1949. Amici are concerned that foreigners capturing American forces in current or future conflicts will use the failure of the United States to follow the competent tribunal requirement in the Geneva Conventions at Guantanamo as justification for refusing to apply the Geneva Conventions to American captives.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Headquarters Marine Corps, and in that capacity, he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms

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[1] Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the amici curiae has made a monetary contribution to the preparation and submission of this brief.

was the senior legal advisor for the Marine Corps from 1985 through 1988, when he retired from the military. General Brahms is currently in private practice in Carlsbad, California and is a member of the Board of Directors of the Judge Advocates Association. He also served as the Technical Advisor for the film *A Few Good Men*.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After a break for law school, he returned to the Navy in 1977 and remained in the Navy until 2002, when he retired from the military. He served as the Navy's Judge Advocate General from June 2000 through June 2002. Rear Admiral Guter was in the Pentagon when it was attacked by terrorists on September 11, 2001.

Rear Admiral John D. Hutson served in the United States Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. He is presently the Dean and President of the Franklin Pierce Law Center in Concord, New Hampshire.

SUMMARY OF ARGUMENT

For more than 200 years, the United States has been at the forefront of international efforts to codify and safeguard the rights of prisoners captured in wartime. Those efforts resulted, after World War II, in the Geneva Conventions of 1949, which the Senate ratified in 1955. Key provisions of those Conventions have been incorporated in American military regulations, including the requirement that the status of captured persons must be determined by a competent tribunal if there is any doubt that the captives are prisoners of war to whom the protections of the Geneva Conventions apply.

The requirement that prisoners' status be determined by a competent tribunal comports with the fundamental principle that the Constitution established a government of limited powers. The government should not be permitted, through

Executive fiat, to imprison persons indefinitely when no charges have been brought against them and the prisoners are barred from all access to courts and other tribunals to determine their status.

This principle is especially important to the members of the United States Armed Forces. American troops are dispatched regularly on a wide variety of missions around the globe. If any of them are captured, our government will undoubtedly insist that they be treated in accordance with the principles of the Geneva Conventions. But if the United States refuses to apply the competent tribunal requirement in the Geneva Conventions to the prisoners being held at Guantanamo, it increases the likelihood that foreign authorities holding American captives will decide to ignore the Geneva Conventions entirely—thereby putting the lives of American prisoners at risk.

ARGUMENT

I. The United States Has Played A Leading Role In Developing International Standards To Safeguard The Rights Of Captured Prisoners.

The United States has long "been a leader in the development of th[e] trend * * * of bettering the humanitarian principles invoked in the treatment of prisoners of war." Gen. J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 MIAMI L.Q. 40, 41 (1950). A 1785 treaty between the United States and Prussia "probably constituted the first international attempt to provide in time of peace for the protection of prisoners of war." Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 5-6 (1977). In 1863, Abraham Lincoln commissioned Dr. Francis Lieber to draft a code of conduct for the Union army in treating prisoners of war. *Id.* at 7. The Lieber Code, as it came to be known, "was perhaps the first formal codification of rules governing the treatment to be

accorded prisoners of war," Dillon, 5 MIAMI L.Q. at 42, and it "had a significant influence on the attitude of nations and on the subsequent Hague Conventions of 1899 and 1907," *ibid.*, which were "the first effective multilateral codification[s] of the law of war," Levie, PRISONERS OF WAR, at 8. After World War I, the United States and Germany entered into an agreement concerning the treatment of prisoners of war. Dillon, 5 MIAMI L.Q. at 42. The subsequent 1929 Geneva Convention Relative to the Treatment of Prisoners of War, signed by the United States and more than 40 other nations, bore "a striking resemblance to the United States-German agreement." *Id.* at 43.

The Geneva Convention of 1929 played a significant role during World War II. Scholars have concluded that "'the fact that millions of prisoners of war from all camps, notwithstanding the holocaust, did return, is due exclusively to the observance of the Geneva Prisoners of War Convention.'" Levie, PRISONERS OF WAR, at 10 n.44. "The American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany during World War II to compliance with the 1929 Convention." *Ibid.*

But the treatment of prisoners of war during World War II also indicated that the Geneva Convention of 1929 required substantial revision to broaden and clarify the circumstances under which its protections would apply. *Id.* at 10-11. Some countries had argued that the 1929 Convention did not apply to protect prisoners when the invading country had not formally declared war; Germany had claimed that the 1929 Convention did not apply to Polish prisoners because the Polish government ceased to exist; and Germany had contended as well that the 1929 Convention did not apply to French prisoners because France ceased to be a belligerent after signing an armistice with Germany. *Id.* at 11-12.

Following World War II, an American general suggested to the President of the International Committee of the Red Cross ("ICRC") that "a meeting of experts on prisoner of war affairs of the various belligerent nations be called with the view of recording for future reference, their experiences under the Convention of 1929." Dillon, 5 MIAMI L.Q. at 43. The ICRC agreed, and sent invitations "to all of the belligerents of World War II." *Ibid.* The United States went on to play "a major role both in the prepatory steps and in the conference proceedings." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Committee on Foreign Relations*, 84th Cong., 1st Sess., at 3-4 (1955) ("Senate Hearing") (statement of Robert Murphy, Deputy Under Secretary of State). A series of meetings involving the United States and other nations resulted in the four Geneva Conventions of 1949, including the Geneva Convention Relative to the Treatment of Prisoners of War, commonly known as the "Third Geneva Convention." Dillon, 5 MIAMI L.Q. at 43.

The Senate debate on ratification of the 1949 Conventions suggests that two basic principles animated the Senate's eventual decision to ratify. First, there was a belief that it was critical for the United States to lend its moral authority to the Conventions and to provide a model for other nations to follow in treating prisoners of war. In urging Senate approval, Secretary of State John Foster Dulles stated that American "participation is needed to enlist the authority of the United States in the[] interpretation and enforcement" of the Conventions. Senate Hearing at 61. Secretary Dulles went on to express the view that "United States ratification of the Geneva Conventions, by lending further support to their standards, should influence favorably future behavior toward prisoners of war." *Id.* at 68.

Second, by treating prisoners of war in accordance with the 1949 Conventions, the United States believed that it would

encourage its enemies to reciprocate in their treatment of American prisoners of war. Deputy Under Secretary of State Murphy informed the Senate Committee on Foreign Relations that although neither North Korea nor the United States had ratified the 1949 Conventions at the time of the Korean War, "the moral acceptance of the conventions as a general norm did have some effect on" North Korea's treatment of American prisoners of war during the war. *Id.* at 5. Looking to the potential for future conflicts, Secretary Dulles explained that American "participation is needed to * * * enable us to invoke them for the protection of our nationals." *Id.* at 61. Similarly, Senator Mike Mansfield stated that "it is to the interest of the United States that the principles of these conventions be accepted universally by all nations." 101 Cong. Rec. 9960 (July 6, 1955). Senator Mansfield explained that American "standards are already high. The conventions point the way to other governments. Without any real cost to us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people as compared with what had been their previous treatment." *Ibid.* Senator Alexander Smith concurred: "I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is our own United States. * * * To the extent that we can obtain a worldwide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment." *Id.* at 9962.

II. The Geneva Conventions And U.S. Military Regulations Implementing The Conventions Require That A Competent Tribunal Determine The Status Of Captured Prisoners.

Article 5 of the Third Geneva Convention of 1949 provides:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining POWs], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.

The same requirement has been adopted in American military regulations:

> All persons taken into custody by U.S. forces will be provided with the protections of the GPW [1949 Geneva Convention on Prisoners of War] until some other legal status is determined by competent authority.

United States Dep't of Army, Regulation 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees," § 1-5(a)(2) (Oct. 1, 1997).[2] The regulation further provides:

> (a) In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated under Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

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[2] Regulations for the other branches of the military contain the same provisions discussed in the text. See OPNAVINST 3461.6 (Navy); AFJI 31-304 (Air Force); MCO 3461.1 (Marine Corps).

(b) A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

Id. § 1-6.

Moreover, it is Department of Defense policy to comply with the Laws of War, including the Geneva Conventions, "in the conduct of military operations and related activities in armed conflict, *however such conflicts are characterized.*" Judge Advocate General's School, OPERATIONAL LAW HANDBOOK 10 (O'Brien, ed. 2003) (emphasis added); see also Department of Defense Directive No. 5100.77, ¶ 5.3.1 (Dec. 9, 1998). Thus, the military instructs its Judge Advocates that they "should advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status may be determined." OPERATIONAL LAW HANDBOOK at 22.

III. These Cases Raise Issues Of Extraordinary Significance.

A. The Judicial Branch Has A Duty To Act As A Check On The Executive Branch, Even In Wartime.

In times of war, this Court has deferred to a considerable extent—and properly so—to the military and to the Executive Branch. But this case poses an issue that this Court has never decided: whether foreigners captured by American forces may be imprisoned indefinitely, without charges, based simply on the government's say-so, and without allowing the foreigners access to any court or "competent tribunal" to determine their status.

The D.C. Circuit's answer was that the courts have no role; the Executive Branch's indefinite imprisonment of petitioners cannot be challenged in any court or tribunal. But complete judicial deference on this point is at odds with the specific military regulations already discussed. It is irreconcilable, too, with the limited government that the Founding Fathers adopted.

The Constitution was designed to "guard[] the foundations of civil liberty against the abuses of unlimited power." *Ex parte Milligan*, 71 U.S. 2, 126 (1866). The Constitution must impose some limits on the authority of government officials to pronounce that detainees may be held indefinitely, without being charged and without any sort of hearing or judicial process. "Such a practice, once established with the best of intentions, will drift into oppression * * * in this country as surely as it has elsewhere." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 226 (1953) (Jackson, J., dissenting). "[D]ifferences in the process of administration make all the difference between a reign of terror and one of law." *Ibid.* Thus, although the courts "must accord great respect and consideration to the judgments of the military authorities," it is "essential that there be definite limits to military discretion." *Korematsu* v. *United States*, 323 U.S. 214, 233-234 (1944) (Murphy, J., dissenting). See also *Shaughnessy*, 345 U.S. at 218 (Black, J., dissenting) (no "governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice").

To be sure, this is a perilous time, as the President has stated. But that does not justify indefinite confinement without any type of hearing or judicial review. Indeed, in previous conflicts, the United States conducted Article 5 hearings to determine whether captured persons should be accorded POW status under the Geneva Conventions. OPERATIONAL LAW HANDBOOK at 22 n.2 (discussing hearings conducted during the first Gulf War); *Contemporary Practice of the United*

States Relating to International Law, 62 AM. J. INT'L. L. 754, 768-775 (1968) (hearings during the Vietnam war).

Nor do the September 11 attacks and the ensuing war on terrorism mean that courts may abdicate their vital role in our constitutional system of checks and balances. As Benjamin Franklin cautioned long ago, "[t]hose who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety." Benjamin Franklin, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA, title page (1759) (Arno Press reprint 1972). This Court has made clear that "the duty * * * rests on the courts, *in time of war as well as in time of peace*, to preserve unimpaired the constitutional safeguards of civil liberty." *Ex parte Quirin*, 317 U.S. 1, 19 (1942) (emphasis added). "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government." *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality opinion). Indeed, this Court heard and decided *Quirin* in the summer of 1942, only eight months after the Japanese attack on Pearl Harbor, when the outcome of the Second World War was still very much in doubt. See also *Sterling* v. *Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions"); *Milligan*, 71 U.S. at 121 (the "pernicious" idea that a Constitutional provision "can be suspended during any of the great exigencies of government * * * leads directly to anarchy or despotism"); *Brown* v. *United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting) (although the President in wartime "has a discretion vested in him * * * he cannot lawfully transcend the rules of warfare established among civilized nations. He

cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims"). If courts do not "abide by the Constitution" in wartime, "they cease to be civil courts and become instruments of military policy." *Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting).

Furthermore, "'[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. * * * The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.'" *Chandler* v. *Miller*, 520 U.S. 305, 322 (1997) (quoting *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)). Even assuming that the government now is acting out of the best of intentions, this Court has cautioned that "[t]his nation * * * has no right to expect that it will always have wise and humane rulers * * *. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln." *Milligan*, 71 U.S. at 125. If that ever happens, the "dangers to human liberty" from total judicial deference to the Executive Branch "are frightful to contemplate." *Ibid.* A successful conclusion to the war on terror "will have been in vain" if "we discover that in the process we have destroyed the very freedoms for which we fought." *Estep* v. *United States*, 327 U.S. 114, 132 (1946) (Murphy, J., concurring).

B. Failure To Provide Any Judicial Review Of The Government's Actions Could Have Grave Consequences For U.S. Military Forces Captured In Future Conflicts.

There is another reason why it is essential that the government follow American military regulations that incorporate the "competent tribunal" guarantee of the Geneva Conventions: American failure to provide foreign prisoners with the protections of the Geneva Conventions may well

provide foreign authorities, in current or future conflicts, with an excuse not to comply with the Geneva Conventions with respect to captured American military forces.

This Court has observed that "[t]he United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). See also Max Boot, THE SAVAGE WARS OF PEACE xiv (2002) ("Between 1800 and 1934, U.S. Marines staged 180 landings abroad"). In recent decades, American armed forces have been engaged somewhere abroad nearly every year. The historic pattern shows no sign of abating; "America's strategic situation today presents more opportunities than ever before for * * * entanglements" in "small wars." *Id.* at xix-xx.

It is, unfortunately, inevitable that some American military personnel involved in future conflicts will be captured or taken prisoner. When that happens, the United States government and the families and friends of the detained service men and women will share a strong interest: ensuring that American personnel are treated humanely and fairly.

Indeed, in past conflicts the United States has insisted that American soldiers held by the enemy be accorded the basic protections of the Geneva Conventions. See, *e.g.*, Maj. Gen. George S. Prugh, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973, at 63 (Dep't of the Army 1975); 64 DEP'T OF STATE BULL. 10 (Jan. 4, 1971) (White House statement announcing President Nixon's call for application of the 1949 Geneva Conventions to ease "the plight of American prisoners of war in North Viet-Nam and elsewhere in Southeast Asia").

The United States has also demanded application of the principles codified in the Geneva Conventions to captured U.S. service personnel, even when they were taken prisoner under circumstances when the Conventions, technically, did not apply. For example, following the capture of U.S. Warrant Officer Michael Durant by forces under the control of Somali warlord Mohamed Farah Aideed in 1993, the United States demanded assurances that Durant's treatment would be consistent with the broad protections afforded under the Conventions, even though, "[u]nder a strict interpretation of the Third Geneva Convention's applicability, Durant's captors would not be bound to follow the convention because they were not a 'state.'" Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War On Terror,"* 44 HARV. INT'L. L. J. 301, 310 (Winter 2003).[3]

Invoking international human rights standards, the United States also has condemned foreign governments that have held detainees incommunicado, depriving them of the ability to seek judicial review of their confinements. The United States, for example, objected recently when the Liberian government arrested journalist Hassan Bility, and held him incommunicado on the purported ground that he was an "illegal combatant" involved in terrorist activity. AFRICA NEWS, Jan. 3, 2003 (available on Nexis). In a statement issued by our Ambassador in Monrovia, "[t]he United States call[ed] on the Government of Liberia to release those political and other prisoners, including those such as Hassan Bility * * *, who are being held without access to lawyers, the civil courts or independent observers" in "violation of international standards of human rights and legal protection, and contrary to Liberia's basic legal principles." John W. Blaney, Nov. 21, 2002 Press

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[3] American invocation of the Geneva Conventions evidently had its desired effect. "Following these declarations by the United States, heavy-handed interrogations of Durant appeared to cease, the Red Cross was allowed to visit him and observe his treatment, and he was subsequently released by Aideed as a 'gesture of goodwill.'" 44 HARV. INT'L L.J. at 310.

Conference statement (available at http://usembassy.state.gov/monrovia/wwwh112102.html). The Ambassador explained that "our reasons" for seeking the release of Bility—who had "been held in prison for many months without ever having been charged with any crime"—did "not revolve around whether we thought Mr. Bility was or was not guilty of any crime. That is not the point. An honest and competent civil court should have judged that question, not any individual or official." John W. Blaney, Jan. 2, 2003 Statement (available at http://usembassy.state.gov/monrovia/wwwhsp010203.html).

Yet even as American officials condemn other nations for detaining people indefinitely without access to a court or tribunal, authoritarian regimes elsewhere are pointing to U.S. treatment of the Guantanamo prisoners as justification for such actions. Eritrea's Ambassador to the United States defended his own government's roundup of journalists by claiming that their detention without charge was consistent with the United States' detention of material witnesses and aliens suspected by the United States of terrorist activities. Fred Hiatt, *Truth-Tellers in a Time of Terror*, WASH. POST, Nov. 25, 2002, at A15. See also Shehu Sani, *U.S. Actions Send a Bad Signal to Africa: Inspiring Intolerance*, INT'L HERALD TRIB., Sept. 15, 2003, at 6 ("indefinite detention in Guantanamo Bay * * * helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso").

If American detention of the Guantanamo prisoners —indefinite confinement without any type of review by a court or tribunal—is regarded as precedent for similar actions by countries with which we are at *peace*, it is obvious that it may be similarly regarded by *enemies* who capture American soldiers in an existing or future conflict. As a result, the lives of captured American military forces may well be endangered

by the United States' failure to grant foreign prisoners in its custody the same rights that the United States insists be accorded to American prisoners held by foreigners.

The importance of reciprocal treatment of a country's own citizens and the citizens of foreign lands has an ancient pedigree. Nearly 800 years ago, the Magna Carta provided that foreign merchants from countries at war with England

> "shall be attached without harm of body or goods, until it be known unto us, or our chief justice, how our merchants be entreated who are then found in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us."

Johnson v. *Eisentrager*, 339 U.S. 763, 783 n.11 (1950) (quoting Magna Carta, chapter 30, in 3 THE COMPLETE STATUTES OF ENGLAND 27 (Halsbury's Laws of England 1929)).

Reciprocity has been especially significant in the context of the Geneva Conventions of 1949. As noted earlier, the Eisenhower administration, when urging Senate ratification of the Conventions, stressed that American accession to the Conventions would redound to the benefit of captured American soldiers. Senators recognized the same thing. See p. 5, *supra*. In Vietnam, the American decision to apply the Geneva Conventions' principles to captured enemy soldiers was driven in part by the desire to obtain "reciprocal benefits for American captives." Prugh, VIETNAM STUDIES at 62-63. And American insistence that the enemy apply the Geneva Conventions to American POWs in Vietnam saved American lives:

> [A]pplying the benefits of the Convention to those combat captives held in South Vietnam did enhance the opportunity for survival of U.S. service members held by the Viet Cong and North Vietnamese. While the enemy never officially acknowledged the applicability

> of the Geneva Convention, and treatment of American POWs continued to be brutal, more U.S. troops were surviving capture. Gone were the days when an American advisor was beheaded, and his head displayed on a pole by the Viet Cong. On the contrary, the humane treatment afforded Viet Cong and North Vietnamese Army prisoners exerted constant pressure on the enemy to reciprocate, and the American POWs who came home in 1973 survived, at least in part, because of [that].

Col. Fred L. Borch, Review of *Honor Bound*, 163 MIL. L. REV. 150, 152 (2000).

In the current debate about the Guantanamo prisoners, commentators have pointed out that "[t]he Geneva Conventions operate on the principle of reciprocity," Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 317 (2002), and that if the United States does not apply the Geneva Conventions, it heightens the risk that captured Americans will be denied the protection of the Conventions by foreigners. See Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 CORNELL INT'L L.J. 59, 90 (2003) ("Interpolating unrecognized exceptions into the contours of prisoner of war status * * * undermines the Geneva Conventions as a whole," and could easily "boomerang to haunt U.S. or allied forces: enemy forces that might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally creative reasons for denying prisoner of war status. By flaunting international law at home, the United States risks undermining its own authority to demand implementation of international law abroad"); Steven W. Becker, *"Mirror, Mirror on the Wall . . . " : Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563, 572 (2003) (American failure to grant POW status under the Geneva Convention "is placing U.S. military

personnel abroad in danger, as we have troops in many parts of the world, and it is reasonable to assume that at some time some of them may be captured. If the same treatment is applied to them, we would be hard put to argue otherwise"); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 340 (2002) (it "seriously disserves the long-term interests of the United States—whose nonuniformed intelligence and military personnel will conduct extensive armed activities abroad in the months ahead—to assert that any captive who can be labeled an 'unlawful combatant' should be denied prisoner-of-war status under the Geneva Conventions").[4] As one commentator has observed:

> What if another country were to arrest U.S. citizens, take them to a location over which that country had control, but no technical sovereignty, and then argue that the country's own law did not apply in that territory—so that our citizens would not have a right to counsel, or even to know what the charges against them might be? We would be distressed.

Anupam Chander, *Guantanamo and the Rule of Law: Why We Should Not Use Guantanamo Bay to Avoid the Constitution*, FindLaw's Legal Commentary (http://writ.news.findlaw.com/commentary/20020307_chander.html).

In 1950, the *Eisentrager* Court was concerned that permitting German nationals to seek habeas relief—after

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[4] The danger that captured Americans might be mistreated is increased for those American forces overseas, some in Afghanistan for example, who do not always wear military uniforms. See Mary McGrory, *Bungling on the 9-11 Prisoners*, WASH. POST, Feb. 10, 2002, at B7; John Mintz & Mike Allen, *Bush Shifts Position on Detainees*, WASH. POST, Feb. 8, 2002, at A1; Jess Bravin et al., *Status of Guantanamo Bay Detainees is Focus of Bush Security Team's Meeting*, WALL ST. J., Jan. 28, 2002, at A16.

having received both a trial and post-conviction review by a military reviewing authority (339 U.S. at 766)—would "purchase no equivalent for benefit of our citizen soldiers." *Id.* at 779. The concern about equivalent benefit is different today. In the last half-century, nearly every country on the planet has adopted the 1949 Geneva Conventions, which, among other things, guarantees access to a "competent tribunal" when there is doubt about whether a detainee is a prisoner of war. It is the United States, which has incorporated the Geneva Conventions' competent tribunal guarantee into American military regulations, that is presently deviating from international norms. Denying the Guantanamo prisoners access to a competent tribunal increases the danger that captured American forces will receive *that* "equivalent" treatment.

Seventy-five years ago, Justice Brandeis eloquently warned:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that * * * the end justifies the means * * * would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead, 277 U.S. at 485 (Brandeis, J., dissenting). The United States still serves as an example to the world. Our concern is that, in this instance, the government is setting an example that is not only fundamentally at odds with the rule of law, but that puts American troops in peril.

* * *

The questions posed by these cases are momentous. This Court has never held whether foreigners captured abroad by

the United States may be held indefinitely—perhaps for the rest of their lives—without bringing any charges against them and without ever providing the prisoners with some sort of hearing to determine their status. The importance of this question is magnified because the Guantanamo detentions could last a very long time indeed. The war on terror may go on for decades, and we will not know, at the time, when it is finally over. This war will not end with a surrender ceremony on the deck of the *Missouri*.

The issues in these cases are especially significant to the members of American military forces, who may be denied the protections of the Geneva Conventions in the future by foreign captors using American treatment of the Guantanamo detainees as precedent. If there is a "new paradigm" of warfare following September 11, as some contend, these cases will determine the rules, or lack of rules, that apply to captured prisoners in this new type of war—and potentially to Americans taken captive. Given the importance of the issues and the potentially grave practical consequences of the D.C. Circuit's decision, this Court's review is undoubtedly warranted.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

MIRNA ADJAMI
Midwest Immigrant and Human Rights Center
208 South LaSalle Street
Chicago, IL 60603
(312) 660-1330

JAMES C. SCHROEDER
Counsel of Record
GARY A. ISAAC
STEPHEN J. KANE
JON M. JUENGER
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Amici Curiae

OCTOBER 2003

(34) (33)

Nos. 03-334 and 03-343

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

SHAFIQ RASUL, ET AL.,
Petitioners,
v.
GEORGE W. BUSH, ET AL.,
Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Petitioners,
v.
UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT APPENDIX

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
JARED A. GOLDSTEIN
HEATHER LAMBERG KAFELE
SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-8000
(202) 508-8100 fax
Counsel for Petitioners
in No. 03-343

JOSEPH MARGULIES
Counsel of Record
MARGULIES & RICHMAN, PLC
2520 Park Avenue, South
Minneapolis, MN 55404
(612) 872-4900
(612) 872-4967 fax
Counsel for Petitioners
in No. 03-334

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. GARRE
DAVID B. SALMONS
Assistants to the Solicitor General
DOUGLAS N. LETTER
ROBERT M. LOEB
CATHERINE Y. HANCOCK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
(202) 514-3658 fax
Counsel for Respondents

[Additional Counsel Listed On Inside Cover]

Petition For Certiorari Filed September 2, 2003
Certiorari Granted November 10, 2003

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MICHAEL RATNER
BARBARA J. OLSHANSKY
STEVEN WATT
Center for Constitutional Rights
666 Broadway
New York, NY 10012
(212) 614-6430
(212) 614-6499 fax

JOHN J. GIBBONS
GITANJALI S. GUTIERREZ
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, NJ 07102
(973) 596-4700
(973) 596-0545 fax
Counsel for Petitioners
in No. 03-334

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RELEVANT DOCKET ENTRIES

US Court of Appeals for the DC Circuit

AL ODAH, et al v. USA, et al

8/12/02 CIVIL-US CASE docketed – Notice of Appeal filed by Appellants Khaled A. F. Al Odah, et al., [696265-1] (jth) [02-5251]

8/12/02 LETTER filed by Counsel for Appellants Khaled A.F. Al Odah, et al., in accordance with D.C. Circuit Rule 47.2 regarding expedition of this case [696266-1]. Certificate of mail service dated 8/6/02. [THIS LETTER WAS RECEIVED ON 8/6/02 BEFORE RECEIPT OF THE NOTICE OF APPEAL FROM DISTRICT COURT] (jth) [02-5251]

8/21/02 CLERK'S ORDER filed [697023] directing Appellant to file [697023-1]: docketing statement; certificate of counsel; statement of issues; lower court decision; any procedural motions; transcript status notice; deferred appendix notice; appearance form; certification that appellate docketing fee has been paid to the Clerk of the district court due 9/20/02; any dispositive motions due 10/7/02. Directing Appellee to file [697023-2]: certificate of counsel; any procedural motions; appearance form due 9/20/02; any dispositive motions due 10/7/02. [Entry Date: 8/21/02] (sha)[02-5251]

* * *

8/27/02 MOTION filed (5 copies) by Appellant Khaled A. F. Al Odah, et al. (certificate of service dated 8/27/02 by mail) to expedite appeal [698356-1]. Response due on 9/9/02. (sha) [02-5251]

* * *

9/5/02 RESPONSE filed [700051-1] (5 copies) by Appellee USA, Appellee George W. Bush, Appellee Donald H. Rumsfeld, Appellee Richard B. Myers, Appellee Rick Baccus, Appellee Terry Carrico (certificate of service dated 9/5/02) to a motion expedite case [698356-1]. (sha) [02-5251]

9/9/02 PER CURIAM ORDER filed [700707] granting motion expedite case and setting briefing schedule [700707-1]: Appellant's brief due on 9/17/02; Appellant's appendix due on 9/17/02; Appellee's brief due on 10/11/02; Appellant's reply brief due on 10/22/02. Parties directed to file and serve briefs by hand; oral argument date and composition of merits panel will be established by separate order. Before Judges Edwards, Rogers, Tatel. [Entry Date: 9/9/02] (mam)

* * *

9/13/02 PER CURIAM ORDER filed [701827-1] granting the motion to consolidate No. 02-5284 with No. 02-5288 [701789-1]. It is FURTHER ORDERED that the motions to expedite [701779-1], [701783-1] be granted. FURTHER ORDERED, on the court's own motion, that consolidated Nos. 02-5284 and 02-5288 be consolidated with No. 02-5251 [701827-1]. FURTHER ORDERED that the following briefing format and schedule apply in all three consolidated cases [701827-3]: Joint Brief for Appellants Habib and Rasul (not to exceed 14,000 words) due on 9/24/02; Brief for Appellant Odah (not to exceed 14,000 words) due on 9/24/02; Joint appendix due on 9/24/02; Appellees' Brief (not to exceed 14,000 words) due on 10/18/02; Joint Reply Brief for Appellants Habib and Rasul (not to exceed 7,000 words)

due on 10/29/02, Reply Brief for Appellant Odah (not to exceed 7,000 words) due on 10/29/02. Absent extraordinarily compelling circumstances, the court will not grant any modification of these provisions. The parties are directed to file and serve their briefs by hand. The oral argument date and composition of the mertis [sic] panel will be established by separate order. Before Judges: Edwards, Rogers and Tatel. [Entry Date: 9/13/02] [02-5251, 02-5284, 02-5288] (jth) [01-5251 02-5284 02-5288]

* * *

9/13/02 INITIAL SUBMISSIONS filed by Appellees USA, et al., in No. 02-5251, [702183-1]: Certificate of Counsel. (jth) [02-5251]

9/20/02 CLERK'S ORDER filed [703458] to schedule oral argument [703458-1] before Judge Initials: ARR MBG SFW on 12/2/02 at 9:03 AM. [Entry Date: 9/20/02] [02-5251, 02-5284, 02-5288] (cwc) [02-5251 02-5284 02-5288]

* * *

9/20/02 INITIAL SUBMISSIONS filed by the Appellants Khaled A. F. Al Odah, et al., in 02-5251, [703621-1]: docketing statement; certificate of counsel; statement of issues; lower court decisions; the deferred appendix notice (Deferred Appendix needed = n). (jth) [02-5251]

9/20/02 NOTICE filed by Appellants Khaled A. F. Al Odah, et al., in 02-5251, FINAL transcript status notice filed [703624-1]. All Transcripts have been ordered and paid for. Certificate of mail service dated 9/20/02. (jth) [02-5251]

9/24/02 BRIEF lodged by Appellants Khaled A. F. Al Odah, et al in 02-5251 [704182-1]. Copies: 15.

Certificate of e-mail service date 9/24/02. (jlp) [02-5251]

9/25/02 SUPPLEMENT to [704226-1] appellant's brief (Certificate of Compliance) [704182-1] filed by Appellants Khaled A. F. Al Odah, et al. (One copy placed in each copy of brief). (jlp) [02-5251]

9/25/02 PER ABOVE SUPPLEMENT lodged appellant's brief [704182-1] is filed. (jlp) [02-5251]

9/25/02 JOINT APPENDIX filed [704252-1]. Copies: 10. Certificate of e-mail service dated 9/24/02. [02-5251, 02-5284, 02-5288] (jlpP [02-5251 02-5284 02-5288]

9/30/02 MOTION filed (5 copies) (certificate of service dated 9/30/02) to allow amicus curiae [705085-1]. Response due on 10/10/02. Motion filed by Intl Ctr Leg Protc. [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/1/02 NOTICE filed of intention to participate as amicus curiae [705156-1] by Bar Human Rights Com, et al. Certificate of service date 9/30/02. [02-5284, 02-5288] (sha) [02-5284 02-5288]

10/1/02 BRIEF filed by Amicus Curiae for Appellant Bar Human Rights Com, et al. [705161-1]. Copies: 14. Certificate of service date 9/30/02. [02-5284, 02-5288] (sha) [02-5284 02-5288]

10/7/02 NOTICE filed of intention to participate as amicus curiae [706580-1] by Natl Assn Cr Def Law in 02-5288 styled as "Notice of Motion and Motion for Leave to File Brief as Amicus Curiae". Certificate of service date 10/7/02. (sha) [02-5288]

10/7/02 BRIEF lodged by Amicus Curiae for Appellant Natl Assn Cr Def Law in 02-5288 [706585-1]. Copies: 7. Certificate of service date 10/7/02. (sha) [02-5288]

10/8/02 CORRECTED BRIEF filed by Amicus Curiae for Appellant Natl Assn Cr Def Law in 02-5288 [706746-1]. Copies: 15. Certificate of service date 10/7/02. (sha) [02-5288]

10/11/02 BRIEF lodged by Movant-Amicus Curiae-Appellant Intl Ctr Leg Protc in 02-5251 [707626-1]. Copies: 15. Certificate of service date 10/11/02. (NOTE: SEE 10/17/02 ORDER; LEAVE TO FILE THIS BRIEF AS AMICUS CURIAE DENIED.) (sha) [02-5251]

* * *

10/17/02 PER CURIAM ORDER filed [708343] denying non-party motion to allow amicus [705085-1] filed by Intl Ctr Leg Protc, without prejudice to renewal upon the submission, within 7 days of the date of this order, of a brief signed by a member of the Bar of this court. [707626-1] Before Judges Randolph, Garland, Williams. [Entry Date: 10/17/02] [02-5251, 02-5284, 02-5288] (cwc) [02-5251 02-5284, 02-5288] (cwc) [02-5251 02-5284 02-5288]

10/18/02 BRIEF filed by Appellee USA, et al. [708807-1]. Copies: 15. Certificate of service date 10/18/02. [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/18/02 SUPPLEMENTAL APPENDIX lodged by Appellee USA, et al. [708809-1]. Copies: 10. Certificate of service date 10/18/02. [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/21/02 MOTION filed (5 copies) by Appellee USA, et al. (certificate of service dated 10/21/02) for leave

to file [708897-1] a supplemental appendix [708809-1]. [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/24/02 MOTION filed (5 copies) (certificate of service dated 10/24/02) to allow amicus curiae [710058-1]. Motion filed by Intl Ctr Leg Protc [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/24/02 BRIEF lodged by Movant-Amicus Curiae-Appellant Intl Ctr Leg Protc [710060-1]. Copies: 15. Certificate of service date 10/24/02. [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/25/02 NOTICE filed of intention to participate as amicus curiae [711010-1] by WA Leg Fdn, Allied Educ Fdn, Jewish Inst Natl Sec in 02-5284 and 02-5288. (sha) [02-5284 02-5288]

10/25/02 BRIEF filed by Amicus Curiae for Appellee WA Leg Fdn, et al. in 02-5284 and 02-5288 [711015-1]. Copies: 15. Certificate of service date 10/25/02. [02-5284, 02-5288] (sha) [02-5284 02-5288]

U.S. District Court

USDC District of Columbia (Washington)

CIVIL DOCKET FOR CASE #: 02-CV-828

AL ODAH, et al v. USA, et al

DATE	#	DOCKET ENTRY
5/1/02	1	COMPLAINT filed by plaintiffs FAWZI KHALID AL ODAH, KHALED A. F. AL ODAH, OMAR RAJAB AMIN, MOHAMMD R. M. R. AMEEN, NASSER AL MUTAIRI, NAYEF N. N. B. J. AL MUTAIRI, KHALID ABDULLAH MISHAL AL MUTAIRI, MESHAL A. M. TH AL MUTAIRI, MANSOUR K. A. KAMEL, ABDULAZIZ SAYER OWAIN AL SHAMMARI, ABDULLAH SALEH ALI AL AJMI, MESFER SALEH ALI AL AJMI, MUBARA F. S. M. AL DAIHANI, FAYIZ MOHAMMED AHMED AL KANDARI, MOHAMMAD A. J. M. H. AL KANDARI, FWAD MAHMOUD AL RABIAH, MONZER M. H. A. AL RABIEAH, ADIL ZAMIL ABDULL MOHSSIN AL ZAMIL, WALID Z. A. AL ZAMEL (bcs) [Entry date 05/06/02] [1:02cv828]
		* * *
5/1/02	2	NOTIFICATION OF RELATED CASE: Case related to Case No(s): 02-299□ (bcs) [Entry date 05/06/02] [1:02cv828]
5/1/02	3	MOTION filed by plaintiff to consolidate cases for pretrial proceedings to case 02-299 (bcs) [Entry date 05/06/02] [1:02cv828]

5/6/02	–	SUMMONS issued (7) to federal party(s) federal defendant USA, GEORGE W. BUSH, DONALD H. RUMSFELD, RICHARD B. MYERS, RICK BACCUS, TERRY CARRICO, and non-parties: U.S. Attorney and U.S. Attorney General. (bcs) [1:02cv828]
5/7/02	4	RETURN OF SERVICE/AFFIDAVIT of summons and complaint executed on 5/6/02 upon federal defendant GEORGE W. BUSH (bcs) [Entry date 05/09/02] [1:02cv828]
5/7/02	5	RETURN OF SERVICE/AFFIDAVIT of summons and complaint executed on 5/6/02 upon federal defendant DONALD H. RUMSFELD (bcs) [Entry date 05/09/02] [1:02cv828]
5/7/02	6	RETURN OF SERVICE/AFFIDAVIT of summons and complaint executed on 5/6/02 upon federal defendant RICHARD B. MYERS (bcs) [Entry date 05/09/02] [1:02cv828]
5/7/02	7	RETURN OF SERVICE/AFFIDAVIT of summons and complaint executed upon U.S. Attorney on 5/6/02 (bcs) [Entry date 05/09/02] [1:02cv828]
5/7/02	8	RETURN OF SERVICE/AFFIDAVIT of summons and complaint executed upon U.S. Attorney General on 5/6/02 (bcs) [Entry date 05/09/02] [1:02cv828]
5/9/02	9	MOTION filed by plaintiff KHALED A.F. AL ODAH for preliminary injunction; exhibits (9). (rje) [Entry date 05/10/02] [1:02cv828]

5/9/02	11	ERRATA by plaintiffs regarding omitted table of contents belonging to their memorandum of points and authorities in support of plaintiffs' motion for preliminary injunction (cdw) [Entry date 05/14/02] [1:02cv828]
5/13/02	12	RESPONSE by federal defendants USA, GEORGE W. BUSH, DONALD H. RUMSFELD, RICHARD B. MYERS, RICK BACCUS, and TERRY CARRICO to motion to consolidate cases for pretrial proceedings to case 02-299 [3-1] by KHALID AL ODAH (bm) [Entry date 05/14/02] [1:02cv828]
5/14/02	10	ORDER by Judge Colleen Kollar-Kotelly: that defendants shall file an opposition to the motion for preliminary injunction no later than 5/28/02. Plaintiffs shall file a reply to defendants' opposition to the motion for preliminary injunction no later than 6/5/02. The Court will set a hearing date in June that will accommodate the arguments in this case and the arguments in RASUL v. BUSH, 02cv299. The Court shall promptly be provided with a courtesy copy of all filings in the above-captioned matter pursuant to the procedures discussed at the conference call held on 5/13/02. (N) (dot) [1:02cv828]
5/16/02	13	RETURN OF SERVICE/AFFIDAVIT of summons and complaint executed on 5/16/02 upon federal defendant RICK BACCUS, federal defendant TERRY CARRICO (nmr) [Entry date 05/17/02] [1:02cv828]

5/23/02	14	TRANSCRIPT filed for date(s) of 5/13/02. Reporter: Edward Hawkins (aet) [Entry date 05/24/02] [1:02cv828]
5/28/02	15	MOTION filed by federal defendant to dismiss plaintiffs' motion for preliminary injunction [9-1] and complaint [1-1]. (td) [Entry date 05/31/02] [1:02cv828]
6/5/02	16	RESPONSE by plaintiffs in opposition to motion to dismiss plaintiffs' motion for preliminary injunction [9-1] and complaint [1-1] [15-1] by federal defendants; attachment (1). (bm) [Entry date 06/07/02] [1:02cv828]
6/5/02	17	MOTION filed by plaintiff for hearing on plaintiffs' motion for a preliminary injunction (bm) [Entry date 06/07/02] [1:02cv828]
6/14/02	18	ORDER by Judge Colleen Kollar-Kotelly: motion hearing set for 2:00 6/26/02 on defendants' motion to dismiss. The parties' arguments shall be solely focused upon the issue of whether the Court has jurisdiction to entertain plaintiffs' filing. Plaintiffs shall be allotted one half-hour, to make any additional arguments not presented to the Court during arguments in Rasul v. Bush, Civ. No. 02-299, which is also scheduled for oral argument on June 26, 2002. (N) (dot) [1:02cv828]

* * *

6/24/02	20	ORDER by Judge Colleen Kollar-Kotelly: that defendants will speak first and are allotted 20 minutes for prepared comments that address the merits of their motions to dismiss in this case and in the case of RASUL v. BUSH, Civ. No. 02-299. Plaintiffs will speak third, following the arguments made by defendants and those made by petitioners in RASUL, and are allotted fifteen minutes for prepared comments. Plaintiffs should consult petitioners' counsel in RASUL to ensure that plaintiffs' comments are not duplicative of those made by petitioners' cousel [sic] in RASUL. Defendants will be given an appropriate opportunity to respond to the arguments made by plaintiffs in this matter and petitioners in RASUL. (N) (dot) [Entry date 06/25/02] [1:02cv828]

6/26/02	–	STATUS HEARING before Judge Colleen Kollar-Kotelly: hearing held and taken under advisement Reporter: Edward Hawkins (dot) [Entry date 07/01/02] [1:02cv828]
7/3/02	26	MOTION (CONSENT) filed by plaintiff for leave to file post-argument brief correcting erroneous statements by defense counsel a oral argument; EXHIBIT (BRIEF) (aet) [Entry date 07/31/02] [1:02cv828]
7/8/02	22	AMENDED COMPLAINT by plaintiffs adding plaintiff SAAD MADAI SAAD HAWASH AL-AZMI, HAMAD MADAI SAAD, and amending complaint [1-1]. (bcs) [Entry date 07/09/02] [1:02cv828]
7/12/02	23	RESPONSE (OPPOSITIONS) by federal defendants to plaintiff's Post-Argument Brief (mpt) [Entry date 07/15/02] [1:02cv828]
7/16/02	24	REPLY by plaintiffs to defendant's response to plaintiff's post argument brief [23-1]. (aet) [Entry date 07/17/02] [1:02cv828]

7/30/02 25 ORDER by Judge Colleen Kollar-Kotelly: granting motion for leave to late file their reply in support of motion to dismiss and response to plaintiffs request for expeditious hearing [19-1] by federal defendants (N) (dot) [Entry date 07/31/02] [1:02cv828]

7/30/02 27 ORDER by Judge Colleen Kollar-Kotelly: granting motion for leave to file post-argument brief correcting erroneous statements by defense counsel a [sic] oral argument [26-1] by KHALED A.F. AL ODAH (N) (dot) [Entry date 07/31/02] [1:02cv828]

* * *

7/30/02 28 ORDER by Judge Colleen Kollar-Kotelly: granting motion to consolidate cases for pretrial proceedings to case 02-299 [3-1] by FAWZI KHALID AL ODAH in 1:02-cv-00828. The Court consolidates ODAH v. UNITED STATES, Civil Action No. 02cv828, with RASUL v. BUSH, Civil Action No. 02cv299, for the limited purpose of addressing the Court's jurisdiction to hear these matters. (N) (dot) [Entry date 07/31/02] [1:02cv299 1:02cv828]

7/30/02 29 MEMORANDUM OPINION by Judge Colleen Kollar-Kotelly (N) (dot) [Entry date 07/31/02] [1:02 cv 299 1:02cv828]

7/30/02 30 ORDER by Judge Colleen Kollar-Kotelly: granting motion to dismiss first amended petition for writ of habeas corpus [25-1] [26-1] by TERRY CARRICO, MICHAEL LEHNERT, DONALD RUMSFELD, GEORGE WALKER BUSH in 1:02-cv-00299. Granting motion to dismiss plaintiffs' motion for preliminary injunction [9-1]

and complaint [1-1]. [15-1] by federal defendants in 1:02-cv-00828. RASUL v BUSH, 02cv299, and ODAH v. UNITED STATES, 02cv828, are dismissed with prejudice. (N) (dot) [Entry date 07/31/02] [1:02 cv299 1:02cv828]

7/30/02 31 Post Arument brief filed by plaintiffs in 1:02-cv-00828, correcting erroneous statements by defense counsel at oral argument.; exhibits (3) (aet) [Entry date 08/02/02] [1:02cv828]

8/2/02 32 NOTICE OF APPEAL by plaintiffs in 1:02-cv-00828 from order [30-1], entered on: 7/30/02. Copies sent. No fees paid. (COPY) (aet) [Entry date 08/08/02] [Edit date 08/08/02] [1:02cv828]

8/8/02 33 TRANSCRIPT filed for date(s) of 6/26/02. Reporter: Edward Hawkins (aet) [Entry date 08/09/02] [1:02cv828]

8/13/02 – USCA #2-5251 assigned for appeal [32-1] by KHALED A.F. AL ODAH (aet) [Entry date 08/20/02] [1:02cv828]

* * *

9/9/02 – NOTICE OF APPEAL by petitioners SHAFIQ RASUL in 1:02-cv-00299, SKINA BIBI, ASIF IQBAL, MOHAMMED IQBAL, DAVID HICKS, TERRY HICKS from order [43-1], order [41-1], entered on: 7/30/02. Fees paid. Copies sent. (aet) [Entry date 09/11/02] [1:02cv299]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH)
FAHAD AL ODAH)
Detainee, Camp X-Ray/)
Camp Delta)
Guantanamo Bay Naval Base)
Guantanamo Bay, Cuba)
)
KHALED A. F. AL ODAH)
Next Friend of Fawzi Khalid)
Abdullah Fahad)
Al Odah)
Kuwait)
)
OMAR RAJAB AMIN,)
Detainee, Camp X-Ray/) No.
Camp Delta) CV 02-0828 (CKK)
Guantanamo Bay Naval Base)
Guantanamo Bay, Cuba)
)
MOHAMMAD R. M. R. AMEEN)
Next Friend of Omar Rajab)
Amin)
Kuwait)
)
NASSER NIJER NASER)
AL MUTAIRI)
Detainee, Camp X-Ray/)
Camp Delta)
Guantanamo Bay Naval Base)
Guantanamo Bay, Cuba)
)
NAYEF N.N.B.J. AL MUTAIRI)
Next Friend of Nasser Nijer)
Naser Al Mutairi)
Kuwait)

KHALID ABDULLAH MISHAL)
AL MUTAIRI)
Detainee, Camp X-Ray/)
Camp Delta)
Guantanamo Bay Naval Base)
Guantanamo Bay, Cuba)
)
MESHAL A.M. TH AL MUTAIRI)
Next Friend of Khalid)
Abdullah Mishal)
Al Mutairi)
Kuwait)
)
ABDULLAH KAMAL ABDULLAH)
KAMAL AL KANDARI)
Detainee, Camp X-Ray/)
Camp Delta)
Guantanamo Bay Naval Base)
Guantanamo Bay, Cuba)
)
MANSOUR K.A. KAMEL)
Next Friend of Abdullah Kamal)
Abdullah Kamal)
Al Kandari)
Kuwait)
)
ABDULAZIZ SAYER OWAIN AL)
SHAMMARI)
Detainee, Camp X-Ray/)
Camp Delta)
Guantanamo Bay Naval Base)
Guantanamo Bay, Cuba)
)
SAYER O.Z. AL SHAMMARI)
Next Friend of Abdulazziz)
Sayer Owain Al-Shammari)
Kuwait)

ABDULLAH SALEH ALI AL AJMI)
Detainee, Camp X-Ray/)
Camp Delta)
Guantanamo Bay Naval Base)
Guantanamo Bay, Cuba)
)
MESFER SALEH ALI AL AJMI)
Next Friend of Abdullah Safeh)
Ali Al Ajmi)
Kuwait)
)
MOHAMMED FUNAITEL AL)
DIHANI)
Detainee, Camp X-Ray/)
Camp Delta)
Address Unknown)
)
MUBARAK F.S.M. AL DAIHANI)
Next Friend of Mohammed)
Funaitel)
Al Dihani)
Kuwait)
)
FAYIZ MOHAMMED AHMED)
AL KANDARI)
Detainee, Camp X-Ray/)
Camp Delta)
Address Unknown)
)
MOHAMMAD A.J.M.H. AL)
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MONZER M.H.A. AL RABIEAH)
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Al Rabiah)
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ADIL ZAMIL ABDULL)
MOHSSIN)
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Camp Delta)
Address Unknown)
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WALID Z.A. AL ZAMEL)
Next Friend of Adil Zamil)
Abdull Mohssin)
Al Zamil)
Kuwait)
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SAAD MADAI SAAD HA WASH)
AL-AZMI)
Detainee, Camp X-Ray/)
Camp Delta)
Address Unknown)
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HAMAD MADAI SAAD)
Next Friend of Saad Madai)
Saad Hawash)
Al Azmi)
Kuwait)
)
Plaintiffs,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
GEORGE W. BUSH,)
President of the United States)
The White House)
1600 Pennsylvania Avenue)
Washington, D.C. 20500)

DONALD H. RUMSFELD,
Secretary of Defense
Department of Defense
1000 Defense Pentagon
Washington, D.C. 20301-1000

GENERAL RICHARD B. MYERS
Chairman, Joint Chiefs of Staff
9999 Joint Chiefs of
Staff Pentagon
Washington, D.C. 20318-9999

BRIGADIER GENERAL
RICK BACCUS,
Commander, Joint Task
Force-160
Guantanamo Bay Naval Base
Guantanamo Bay, Cuba

COLONEL TERRY CARRICO
Commander, Camp X-Ray/
Camp Delta
Guantanamo Bay Naval Base
Guantanamo Bay, Cuba,

Defendants.

AMENDED COMPLAINT

This is a civil action brought by 12 Kuwaiti nationals (the "Kuwaiti Detainees") who are being detained in the custody of the United States at the Guantanamo Bay Naval Base, Guantanamo Bay, Cuba ("Guantanamo"), and by 12 of their family members (the "Family Members") who are also Kuwaiti nationals and who speak on their behalf. The Kuwaiti Detainees have been held virtually *incommunicado* since as early as January 11, 2002. Although the Secretary of Defense was authorized by the President in the President's Military Order of November

13, 2001, to detain non-citizens if the President has made a written determination that there is reason to believe they are or were members of al Qaida, or engaged in terrorist acts against the United States, the President has made no such determination with respect to the Kuwaiti Detainees.

Plaintiffs do not seek release from confinement in this Amended Complaint. Rather, they seek modest but essential relief while they are being detained and interrogated by defendants. They seek the right to (1) meet with their families, (2) be informed of any charges against them, (3) be able to consult with counsel of their choice, and (4) have access to the courts or some other impartial tribunal. These are fundamental rights of due process guaranteed to detainees under the Fifth Amendment to the Constitution and customary international law. The grant of this limited relief will not interfere in any way with the ability of the United States to conduct its essential war against terrorism or to determine who was responsible for the horrible acts of September 11, 2001, and to bring those individuals to justice.

I.
JURISDICTION AND VENUE

1. The Court has subject matter jurisdiction of this civil action under 28 U.S.C. §§ 1331, 1350, and 1361. A cause of action exists under the Constitution, 5 U.S.C. § 702, 28 U.S.C. §§1350, 2241-2243, and the laws of nations and treaties of the United States. To the extent immunity to this suit may be asserted by defendants, that immunity is waived by 5 U.S.C. § 702. The Court is authorized to grant the relief requested by plaintiffs under 5

U.S.C. § 706, and 28 U.S.C. §§ 1350, 1361, 1651, 2201, 2202, and 2241-2243.

2. Venue lies in this Court under 28 U.S.C. §§ 1391(b), (e).

II.
PARTIES

3. Plaintiffs Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Abdulaziz Sayer Owain Al Shammari, Abdullah Saleh Ali Al Ajmi, Mohammed Funaitel Al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdull Mohssin Al Zamil, and Saad Madai Saad Alzmi (the "Kuwaiti Detainees") are Kuwaiti nationals who are detained under the custody of the United States at Guantanamo.

4. Plaintiff Khaled A.F. Al Odah is a Kuwaiti national and the father of plaintiff Fawzi Khalid Abdullah Fahad Al Odah; plaintiff Mohammad R.M.R. Ameen is a Kuwaiti national and the brother of plaintiff Omar Rajah Amin; plaintiff Nayef N.N.B.J. Al Mutairi is a Kuwaiti national and the brother of plaintiff Nasser Nijer Naser Al Mutairi; plaintiff Meshal A.M.TH Al Mutairi is a Kuwaiti national and the brother of plaintiff Khalid Abdullah Mishal Al Mutairi; plaintiff Mansour K.A. Kamel is a Kuwaiti national and the brother of plaintiff Abdullah Kamal Abdullah Kamal Al Kandari; plaintiff Sayer O.Z. Al Shammari is a Kuwaiti national and the father of plaintiff Abdulaziz Sayer Owain Al Shammari; plaintiff Mesfer Saleh Ali Al Ajmi is a Kuwaiti national and the brother of Abdullah Saleh Ali Al Ajmi; plaintiff Mubarak F.S.M. Al

Daihani is a Kuwaiti national and the brother of plaintiff Mohammed Funaitel Al Dihani; plaintiff Mohammad A.J.M.H. Al Kandari is a Kuwaiti national and the father of plaintiff Fayiz Mohammed Ahmed Al Kandari; plaintiff Monzer M.H.A. Al Rabieah is a Kuwaiti national and the brother of plaintiff Fwad Mahmoud Al Rabiah; plaintiff Walid Z.A. Al Zamel is a Kuwaiti national and the brother of plaintiff Adil Zamil Abdull Mohssin Al Zamil, and plaintiff Hamad Madai Saad is a Kuwaiti national and the brother of plaintiff Saad Madai Saad Al-Azmi. The plaintiffs other than the Kuwaiti Detainees are referred to as the Family Members.

5. Defendant George W. Bush is the President of the United States; defendant Donald H. Rumsfeld is the Secretary of Defense; defendant General Richard B. Myers is the Chairman of the Joint Chiefs of Staff; defendant Brigadier General Rick Baccus is the Commander of Joint Task Force-160, which is responsible for the detention operation at Guantanamo; defendant Colonel Terry Carrico is the Commandant of Camp X-Ray/Camp Delta at Guantanamo and the custodian of the detainees at Guantanamo. They are sued in their official and individual capacities. The Executive Branch of the United States Government, designated as the United States of America, is also a defendant.

III.
FACTS

The Terrorist Attacks of September 11, 2001

6. On September 11, 2001, terrorists struck the United States, highjacking four airplanes and flying three of them into the twin towers of the World Trade Center in

New York City and the Pentagon, killing thousands of innocent people. Soon after this terrorist attack, the United States Government identified the terrorists as members of the al Qaida terrorist organization.

7. In the wake of the terrorist attack of September 11, 2001, President Bush launched a military campaign against al Qaida headquartered in Afghanistan and supported by the Taliban Regime. On September 18, 2001, Congress adopted a Joint Resolution that authorized the President to use force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons." Joint Resolution 23, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224. The United States' military campaign against al Qaida and the Taliban is being conducted in cooperation with other nations, including Pakistan, as well as a coalition of Afghani groups known as the Northern Alliance, which opposes the Taliban.

8. On information and belief, some members and supporters of al Qaida and the Taliban have attempted to hide from the United States and its allies during the military campaign in dispersed areas of Afghanistan and Pakistan. On information and belief, the United States and its allies have encouraged local authorities in Afghanistan and Pakistan to assist in the location, identification, and apprehension of these al Qaida and Taliban members and supporters.

President Bush's Military Order of November 13, 2001

9. On November 13, 2001, President Bush issued the Military Order of November 13, 2001, entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (the "Military Order"). 66 Fed. Reg. 57,831 (Nov. 16, 2001).

10. Section 1 of the Military Order recites "Findings" about the terrorist attacks of September 11, 2001, including a finding that "it is necessary for individuals subject to this order * * * to be detained."

11. In section 2(a) of the Military Order, President Bush defines the term "individual subject to this order" to mean "any individual who is not a United States citizen with respect to whom I determine from time to time in writing that":

> (1) there is reason to believe that such individual, at the relevant times,
>
> (i) is or was a member of the organization known as al Qaida;
>
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order, and

(2) it is in the interest of the United States that such individual be subject to this order.

12. Section 2(b) of the Military Order declares that "[i]t is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4."

13. Section 3 of the Military Order provides that "[a]ny individual subject to this order shall be (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States."

Seizure of the 12 Kuwaiti Detainees

14. On information and belief, the Family Members allege that the Kuwaiti Detainees were in Afghanistan or Pakistan, some before and some after September 11, 2001, as volunteers for charitable purposes to provide humanitarian aid to the people of those countries, such as assisting in developing potable water sources, working in hospitals, and arranging for the sponsorship of orphans. There is a long tradition of such volunteer service by Kuwaiti nationals in countries of crisis worldwide, including Afghanistan and Pakistan. Such volunteer service is encouraged by the Kuwaiti Government and Kuwaiti employers. One aspect of the Kuwaiti Government support of volunteer service is by continuing to pay the salaries of its Kuwaiti employees while they are engaged in such volunteer service abroad.

15. On information and belief, the Family Members allege that none of the Kuwaiti Detainees is or ever has been a combatant or belligerent against the United States, or a member or supporter of al Qaida or the Taliban, or a member of any terrorist organization, and that none of the Kuwaiti Detainees has ever engaged in or supported any terrorist or hostile act against the United States. None of the Family Members has ever engaged in or supported any terrorist or hostile act against the United States, and on information and belief the Family Members allege that no other member of their families has ever engaged in or supported any terrorist or hostile act against the United States.

16. On information and belief, the Family Members alleged that the Kuwaiti Detainees were seized against their will in Afghanistan or Pakistan after September 11, 2001, by local villagers seeking promised bounties or other financial rewards, and that, subsequently, they were taken into custody by the United States. Several of the families of the Kuwaiti Detainees received letters from several of the Kuwaiti Detainees after they were taken into custody by the United States expressing the sentiment: "Thank God I am now with the Americans," and a confidence that they would soon be able to return home to their families.

United States' Detention of the Kuwaiti Detainees

17. President Bush has not determined in writing that there is reason to believe that, at the relevant times, any of the Kuwaiti Detainees is or was a member of the organization known as al Qaida, or has engaged in any of the acts described in section 2 of the Military Order, or

that it is in the interest of the United States that any of the Kuwaiti Detainees be subject to the Military Order.

18. None of the other defendants has stated publicly or informed plaintiffs why or on what basis the Kuwaiti Detainees are being detained. None of the defendants has stated publicly or informed plaintiffs that the Kuwaiti Detainees are enemy combatants or belligerents against the United States.

19. William T. Monroe, Deputy Chief of Mission of the Embassy of the United States in Kuwait, sent a letter dated March 25, 2002, to the Ministry of Foreign Affairs of Kuwait, stating that plaintiff Fawzi Khalid Abdullah Fahad Al Odah has been in detention under United States custody at Guantanamo since February 13, 2002; plaintiff Omar Rajah Amin has been in detention under United States custody at Guantanamo since January 11, 2002; plaintiff Nasser Nijer Naser Al Mutairi has been in detention under United States custody at Guantanamo since February 7, 2002; plaintiff Khalid Abdullah Mistral Al Mutairi has been in detention under United States custody at Guantanamo since February 9, 2002; plaintiff Abdullah Kamal Abdullah Kamal Al Kandari has been in detention under United States custody at Guantanamo since February 11, 2002; and plaintiff Abdulaziz Sayer Owain Al Shammari has been in detention under United States custody at Guantanamo since February 9, 2002.

20. The family of plaintiff Abdullah Saleh Ali Al Ajmi received a letter from him dated February 28, 2002, mailed from Guantanamo on March 1, 2002, which indicates that he is in detention under United States custody at Guantanamo.

21. On May 6, 2002, a Kuwaiti attorney representing the Family Members was informed by the Government of Kuwait that it received written confirmation from the United States Government that plaintiffs Fayiz Mohammed Ahmend Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdul Mohssin Al Zamil, and Saad Madai Saad Al-Azmi are in detention under custody of the United States at Guanatanamo [sic]. No confirmation has been received to date concerning plaintiff Mohammed Funaitel Al Dihani.

22. On April 3, 2002, Abdul Rahman R. Al-Haroun, a Kuwaiti attorney retained by the families of the Kuwaiti Detainees, received from the Government of Kuwait a copy of the letter referred to in paragraph 19, from William T. Monroe, Deputy Chief of Mission of the Embassy of the United States in Kuwait, to the Ministry of Foreign Affairs of Kuwait.

23. On April 6, 2002, Mr. Al-Haroun and plaintiff Khaled A.F. Al Odah, representing the families of the Kuwaiti Detainees, met at the United States Embassy in Kuwait with Andrew Morrison, First Secretary and Head of the Political Section of the Embassy, and Yousef Khalil, a political specialist at the Embassy. Plaintiff Khaled A.F. Al Odah had previously submitted to the United States Embassy a list containing the names of ten of the 12 plaintiff Kuwaiti Detainees, seeking information about them. At the time of the meeting, plaintiff Khaled A.F. Al Odah did not have information that plaintiffs Adil Zamil Abdull Mohssin Al Zamil and Saad Madai Saad Al-Azmi were in the custody of the United States.

24. During the meeting of April 6, Mr. Al-Haroun and plaintiff Khaled A.F. Al-Odah asked Mr. Morrison and Mr. Khalil to provide them with information about the ten

Kuwaiti Detainees on the list previously submitted by plaintiff Khaled A.F. Al Odah. Specifically, they asked Mr. Morrison and Mr. Khalil to confirm that these ten Kuwaiti Detainees were in the custody of the United States; to identify the location of their detention; to provide their families with the opportunity to contact and meet with them; to advise whether any of them were being accused of wrongdoing, and if not, why they were not being released; and, if any of the ten were being investigated, to grant them access to counsel of their choice and conditional release during the pendency of the investigation.

25. At the meeting of April 6, Mr. Morrison and Mr. Khalil did not provide Mr. Al-Haroun and plaintiff Khaled A.F. Al Odah with any information about the ten plaintiff Kuwaiti Detainees on the list submitted by plaintiff Khaled A.F. Al Odah, and would neither confirm nor deny that any of those Kuwaiti Detainees were in the custody of the United States. However, Mr. Morrison said he would take Mr. Al-Haroun's and plaintiff Khaled A.F. Al Odah's requests under consideration, consult with others, and provide them with a reply.

26. Mr. Al-Haroun and plaintiff Khaled A.F Al Odah have not received any reply to their requests from Mr. Morrison or Mr. Khalil or from anyone else at the United States Embassy in Kuwait or in the United States Government.

27. Counsel for plaintiffs have been told by the Defense Department that, to maintain "force protection," the Defense Department has adopted a policy not to disclose the identities of, or other information about, specific individuals detained by the United States to their families or representatives. Counsel for plaintiffs further

have been told by the Defense Department that the United States is making such disclosures only to the governments of the countries in which those individuals are nationals.

28. The Family Members have not been permitted to meet with the Kuwaiti Detainees.

29. On information and belief, the Family Members allege that the Kuwaiti Detainees have not been informed of the charges, if any against them; they have not been granted the right to designate or consult with counsel of their choice; and they have not been granted access to the courts or any other impartial tribunal during their detention.

Guantanamo

30. Under the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418, 6 Bevans 1113, as extended by the Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866, although the United States recognizes the sovereignty of Cuba over Guantanamo, "the Republic of Cuba consents that * * * the United States shall exercise complete jurisdiction and control over and within" Guantanamo during the lease. The United States has occupied Guantanamo Bay since 1903, and has repeatedly declared its intention to remain there indefinitely.

31. According to the Office of Legal Counsel of the Department of Justice, "the Guantanamo Base would constitute land 'acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof.' Accordingly, it would appear to come within [18 U.S.C.] § 7's definition of land 'within the special maritime and

territorial jurisdiction of the United States.'" 6 Op. O.L.C. 236, 1982 OLC LEXIS 58 (Mar. 29, 1982). Consistent with this opinion, criminal prosecutions under Title 18 of the United States Code of civilians and aliens who commit offenses at Guantanamo are triable exclusively in mainland United States courts. *See, e.g., United States v. Chambers*, 940 F.2d 653 (4th Cir. 1991), *unpublished opinion available at* No. 90-5664, 1991 WL 137232 (July 29, 1991); *United States v. Lee*, 906 F.2d 117, 117 n. 1 (4th Cir. 1990); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975). *See also* 25 Op. Atty. Gen. 157 (1904) (Guantanamo Naval Station "is practically a part of the Government of the United States").

32. The United States Navy has described Guantanamo as "a Naval reservation which, for all practical purposes, is American territory. Under the [lease] agreements, the United States has for approximately [ninety] years exercised the essential elements of sovereignty over this territory, without actually owning it. Unless we abandon the area or agree to a modification of the terms of our occupancy, we can continue in the present status as long as we like. [According to the United States p]ersons on the reservation are amenable only to United States legislative enactments." *See* The History of Guantanamo Bay: An Online Edition (1964), available at http://www.nsgtmo.navy.mil/ history.htm.

Defendants' Statements About Detention at Guantanamo

33. According to a "Fact Sheet" issued by the White House on February 7, 2002, President Bush has determined that the principles of the Third Geneva Convention

of 1949 apply to the treatment of the "Taliban detainees" at Guantanamo, but not to the "al Qaida detainees" at Guantanamo. However, the President has determined that neither the "Taliban detainees" nor the "al Qaida detainees" will be accorded prisoner-of-war status.

34. Defendants have not publicly disclosed or informed plaintiffs whether any of the Kuwaiti Detainees are "Taliban detainees" or "al Qaida detainees," as those terms are used in the White House "Fact Sheet" of February 7, 2002.

35. In a radio interview on February 27, 2002, Secretary Rumsfeld said with respect to the approximately 300 detainees at Guantanamo: "[T]hey have all now, except for one or two, been questioned and interrogated, looking for intelligence information so that we could stop other terrorist threats, people from attacking our country and our friends and allies and our deployed forces and that "[w]e're now starting the process of doing a series of interrogations that involve law enforcement. That is to say to determine exactly what these individuals have done. Not what they know of an intelligence standpoint, but what they've done from a law enforcement standpoint. That process is underway." United States Department of Defense News Transcript, Rumsfeld Interview with KTSP-ABC, St. Paul, Minnesota, February 27, 2002, p. 2. Secretary Rumsfeld continued that the detainees "will fall into four or five baskets. One is if we find that someone's an innocent and shouldn't have been brought there, why they would be released." *Id.*

36. In a Pentagon news briefing on March 28, 2002, Secretary Rumsfeld said with respect to the detainees at Guantanamo: "The fact is that the first people we brought

down were in fact the hardest of the hard core, because we wanted to get them out of the Kandahar and Bagram facilities. Now we have brought down a large portion of the people, and now it is [a] mix, and they vary. They run pretty much across the spectrum. It seems to me that that being the case one can expect that what will happen will be exactly what I said: that some may be transferred to other countries, some may be released, some may be held for the duration, some may be tried in one or more of the various mechanisms that are available – the United States criminal justice system, military commissions, or the Uniform Code of Military Justice. * * * I think the better way to look at it is not at that group of people in the aggregate, but as I've indicated, individually." United States Department of Defense, News Transcript, DoD News Briefing – Secretary Rumsfeld and Gen. Myers, March 28, 2002, pp. 3, 4.

IV.
CLAIMS FOR RELIEF

Based on the allegations in paragraphs 1 through 36, plaintiffs claim:

First Claim: Denial of Due Process – Violation of the Fifth Amendment

37. By refusing to permit the Kuwaiti Detainees in Guantanamo to (1) meet with their families, (2) be informed of the charges, if any, against them, (3) designate and consult with counsel of their choice, and (4) have access to the courts or some other impartial tribunal, even during law enforcement interrogations which may lead to criminal proceedings against them, defendants have

denied and are denying the Kuwaiti Detainees fundamental due process, in violation of the Due Process Clause of the Fifth Amendment to the Constitution.

Second Claim: Tortious Conduct Within the Meaning of the Alien Tort Claims Act

38. By refusing to permit the Kuwaiti Detainees in Guantanamo to (1) meet with their families, (2) be informed of the charges, if any, against them, (3) designate and consult with counsel of their choice, and (4) have access to the courts or some other impartial tribunal, even during law enforcement interrogations which may lead to criminal proceedings against them, defendants have engaged and are engaging in arbitrary detention, which is tortious conduct in violation of the law of nations and a treaty of the United States, and actionable under the Alien Tort Claims Act, 28 U.S.C. § 1350.

Third Claim: Arbitrary and Unlawful Conduct – Violation of APA

39. By refusing to permit the Kuwaiti Detainees in Guantanamo to (1) meet with their families, (2) be informed of the charges, if any, against them, (3) designate and consult with counsel of their choice, and (4) have access to the courts or some other impartial tribunal, even during law enforcement interrogations which may lead to criminal proceedings against them, defendants have engaged and are engaging in arbitrary, unlawful, and unconstitutional conduct, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 555, 702, 706.

V.
PRAYER FOR RELIEF

Based on the allegations in paragraphs 1 through 39, plaintiffs pray for the following relief:

40. A preliminary and permanent injunction, enjoining defendants from refusing to permit the Kuwaiti Detainees at Guantanamo to (1) meet with their families, (2) be informed of the charges, if any, against them, (3) designate and consult with counsel of their choice, and (4) have access to the courts or some other impartial tribunal, subject to reasonable national security and safety requirements.

41. A declaration that defendants' refusal to permit the Kuwaiti Detainees at Guantanamo to 1) meet with their families, (2) be informed of the charges, if any, against them, (3) designate and consult with counsel of their choice, and (4) have access to the courts or some other impartial tribunal, subject to reasonable national security and safety requirements, is a violation of the Due Process Clause of the Fifth Amendment to the Constitution, tortious conduct under the Alien Tort Claims Act, and arbitrary, unlawful, and unconstitutional conduct in violation of the Administrative Procedure Act.

42. Reasonable attorneys' fees and the costs of this action, and such other and further relief as the Court may deem necessary or appropriate.

Respectfully submitted,

/s/ Thomas Wilner
Thomas B. Wilner
(D.C. Bar #173807)
Neil H. Koslowe
(D.C. Bar #361792)

Kristine A. Huskey
(D.C. Bar #462979)
Heather Lamberg Kafele
(D.C. Bar #473584)

SHEARMAN & STERLING
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 508-8000
Facsimile: (202) 508-8100

Attorneys for Plaintiffs

Dated: July 8, 2002

[Certificate Of Service Omitted In Printing]

ICB

International Counsel Bureau

Abdul Rahman R. Al-Haroun &
Ghazi M. Al-Qahtani
Lawyers & Legal Consultants

DECLARATION OF
ABDUL RAHMAN R. AL-HAROUN

Pursuant to 28 U.S.C. section 1746, I, Abdul Rahman Al-Haroun depose and say that:

1. I am a graduate of Kuwait University and am a lawyer licensed to practice law in the State of Kuwait.

2. I have been retained by eleven Kuwaiti families (the families) whose sons (the sons) are missing and, based on my best information and belief, are being held in the custody of the Government of the United States. The names of the sons are listed in Attachment A.

3. All of the sons are Kuwaiti nationals who we believe were seized in Afghanistan or Pakistan after September 11, 2001 by local villagers seeking financial rewards from the United States and who were then turned over into the custody of the Government of the United States.

4. To the best of my knowledge and the knowledge of the families, none of the sons is or ever has been a member or supporter of the Taliban or of the Al Qaida terrorist organisation or of any other terrorist organisation.

5. All of the sons were in Afghanistan or Pakistan as volunteers for charitable purposes to provide aid to the people of those countries.

6. To the best of my knowledge and belief, no member of any of the families has ever been engaged in or supported any terrorist act or any hostile act against the United States.

7. On April 6, 2002 I visited the United States Embassy in Kuwait in an attempt to gather information about the sons. I was accompanied by Khalid Al Odah, the father of one of the sons and the head of a committee formed by all of the families concerned.

8. We were scheduled to meet with the United States Ambassador to Kuwait. However, we met with Mr. Andrew Morrison, First Secretary and Head of the Political Section of the Embassy, and with Mr. Yousef Khalil, a political specialist at the Embassy. We also expected to meet in a private room or office at the Embassy. Instead, the meeting was conducted in an open-air area outside the Embassy cafeteria where other people were eating and walking by.

9. Mr. Al Odah had earlier provided the Embassy with the first ten names on Attachment A seeking information about them. Based on information we had received from the Red Cross and from my Government, we believed all were being held in captivity by the Government of the United States. We did not have information at this point that the eleventh son on the list was also being detained by the United States Government.

10. At the meeting, we asked the U.S. representatives to provide us with any information about the ten individuals on the list we had given them. We asked them to confirm whether these people are in U.S. custody and, if so, to identify where they are being

held and to provide their families the right to contact and meet with them. We also asked whether any of the sons were being accused of any wrong doing and, if not, why they were not being released. We also requested, if they were being investigated, that they be provided with access to counsel of their choice and whether they could be released conditionally while any investigation continued.

11. At that meeting, the U.S. officials provided us with no information about the individuals on the list. They would neither confirm nor deny that any of the sons were being held by the Government of the United States.

12. Mr. Morrison did say that the United States was holding a number of persons in custody. He said that all the persons being held were captured in combat with the United States and are therefore prisoners of war. I pointed out that, under the Geneva Convention, prisoners at a minimum must be identified, have access to and be able to communicate and meet with their families and counsel of their choice. Mr. Morrison replied that it was unclear whether the United State would apply the rules of the Geneva Convention because the prisoners were not being detained in the United States. He said that the United States had the right to hold all these people in confinement "until the end of the war." He did promise to take our requests for information under consideration, to consult with others and to provide us with a reply.

13. To this date, we have received no reply from Mr. Morrison or from anyone else in the U.S. Embassy or from anyone else in the U.S. Government.

14. On April 3, we had received from the Government of Kuwait a copy of a letter it had received from the

U.S. Government indicating that six of the sons are being held in U.S. custody at the U.S facilities in Guantanamo Bay. A copy of that letter is attached as Attachment B. I should note that the English spellings of the names on the list provided by the U.S. Government differ somewhat from the spellings in Attachment A because they are phonetic spellings of Arabic names.

15. In addition, the family of a seventh son, Abdullah Saleh Ali Atallah Al Ajmi, recently received a letter from him from Guantanamo indicating that he is also being held there. Although the letter was only received recently, it was written on February 28 and mailed from Camp X-Ray at Guantanamo on March 1. It indicates that its author is from Kuwait. Nevertheless, Mr. Al Ajmi is not included on the list provided by the U.S. Government of Kuwaiti nationals being held at Guantanamo. We have also received information from the Red Cross and other sources that the remaining sons not included on the list provided by the U.S. Government are also being held at Guantanamo.

16. The families have sent many letters to the sons through the Red Cross and directly to Guantanamo. The letters the families have received from the sons indicate, however, that the sons have not received any of the letters sent to them.

17. Several of the families received letters from their sons after they had been turned over to U.S. authorities in Pakistan or Afghanistan. Those letters all express virtually the same sentiment: "Thank God I am now with the Americans," and a confidence that they would therefore soon be released to come home. I am sure they based those sentiments on their belief that the United States of all nations would not only treat them humanely, but also conduct any investigation

fairly and impartially, in accordance with the principles that the United States has championed around the world.

18. I and the families I represent sympathise deeply with the citizens of the United States who suffered so terribly as a result of the tragedy of September 11. We unequivocally abhor the terrorist acts that caused that tragedy. And we also want the individuals responsible for these acts brought to justice. I believe, however, that justice can be accomplished only when fundamental principles of justice are applied.

19. Article 31 of the Constitution of the State of Kuwait explicitly prohibits any person from being arrested or detained except in accordance with law, which requires that any person detained must be promptly charged or released and have the right to counsel of his or her choice and, if he or she has no counsel, one will be appointed for him or her. I understand that these are fundamental principles in every civilised nation and, in fact, that they are originally derived from principles of Anglo-American jurisprudence.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 24, 2002.

/s/ Abdul Rahman R. Al-Haroun
Abdul Rahman R. Al-Haroun

ATTACHMENT A

1. Fawzi Khalid Abdullah Fahad Al Odah
2. Omar Rajab Amin

3. Nasser Nijer Naser Al Mutairi
4. Khalid Abdullah Mishal Al Mutairi
5. Abdullah Kamal Abdullah Kamal Al Kandari
6. Abdulaziz Sayer Owain Al Shammari
7. Abdullah Saleh Ali Al Ajmi
8. Mohammed Funaitel al Dihani
9. Fayiz Mohammad Ahmed al Kandari
10. Fawd Mahmoud al Rabiah
11. Adil Zamil Abdull Mohssin Al Zamil

Attachment B

[SEAL]

Embassy of the United States of America

Kuwait City, Kuwait

March 25, 2002

Mr. Khalid Al-Maqamis
Director, Coordination & Follow Up Department
Ministry of Foreign Affairs
Kuwait City
State of Kuwait

Dear Mr. Al-Maqamis:

As discussed during our conversation today, I have enclosed the following information about the detainees in Guantanamo:

1. Military Commission Procedures
2. Fact Sheet on Military Commission

3. Biographic data on six detainees at Guantanamo, as given by the detainees

Thank you.

Sincerely,

/s/ William T. Monroe
William T. Monroe
Deputy Chief of Mission

Enclosure a/s

MILITARY COMMISSION PROCEDURES

– THE SECRETARY OF DEFENSE IS FINALIZING THE PROCEDURES GOVERNING U.S. MILITARY COMMISSIONS THAT MAY BE ESTABLISHED TO TRY SUSPECTED INTERNATIONAL TERRORISTS AND THEIR SUPPORTERS FOR VIOLATIONS OF THE LAW OF WAR. THE PRESIDENT HAD DIRECTED HIM TO PREPARE SUCH RULES IN THE MILITARY ORDER OF NOVEMBER 13. THE RULES WERE MADE PUBLIC ON THURSDAY, MARCH 21.

– WE BELIEVE THAT YOUR GOVERNMENT SHOULD BE PLEASED WITH THE OUTCOME.

– THE PROCEDURES TAKE INTO ACCOUNT THAT MANY COMMENTS THAT WE HAVE RECEIVED FROM OUR ALLIES, AS WELL HAS HUMAN RIGHTS GROUPS AND OTHER NONGOVERNMENTAL ORGANIZATIONS.

– THE MILITARY COMMISSIONS WILL BE IMPARTIAL. THEY WILL PROVIDE FULL AND FAIR TRIALS. WE BELIEVE THAT THE PROCEDURES FOR THE

COMMISSIONS PROVIDE APPROPRIATE DUE PROCESS SAFEGUARDS. THEY ARE CONSISTENT WITH FUNDAMENTAL INTERNATIONAL STANDARDS GOVERNING CRIMINAL TRIALS.

THEY ARE CONSISTENT WITH THE PROCEDURAL SAFEGUARDS FOUND IN THE GENEVA CONVENTIONS OF 1949 AND ARTICLE 75 OF PROTOCOL 1 OF 1977 TO THE GENEVA CONVENTIONS. (THE UNITED STATES IS NOT A PARTY TO THE PROTOCOL.)

– ALTHOUGH THE PROCEDURES ADDRESS A DIFFERENT BODY OF LAW, THEY ARE ALSO CONSISTENT WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.

– IN PARTICULAR, THE PROCEDURES INCLUDE THE FOLLOWING:

- THE PRESUMPTION OF INNOCENCE
- CHOICE OF MILITARY AND CIVILIAN COUNSEL
- THE HIGH STANDARD OF PROOF OF GUILT BEYOND A REASONABLE DOUBT
- THE DEATH PENALTY CAN ONLY BE IMPOSED BY A UNANIMOUS DECISION OF A 7 MEMBER PANEL
- REVIEW BY AN IMPARTIAL, 3 MEMBER PANEL (POSSIBLY INCLUDING CIVILIANS WHO ARE TEMPORARILY COMMISSIONED

THE ACCUSED IS NOT REQUIRED TO TESTIFY, AND NO ADVERSE INFERENCE MAY BE DRAWN FROM A REFUSAL TO TESTIFY.

THE ACCUSED MAY PRESENT EVIDENCE IN HIS DEFENSE AND MAY CROSS-EXAMINE WITNESSES PRESENTED BY THE PROSECUTION.

PROCEEDINGS WILL BE OPEN TO THE PUBLIC "TO THE MAXIMUM EXTENT PRACTICABLE" (BUT THEY CAN BE CLOSED TO PROTECT NATIONAL SECURITY AND OTHER INTERESTS). AT ALL TIMES, INCLUDING IN ANY CLOSED PROCEEDINGS, THE ACCUSED WILL BE REPRESENTED BY COUNSEL, AND DEFENSE COUNSEL WILL HAVE ACCESS TO ANY CLASSIFIED EVIDENCE ADMITTED AT TRIAL.

– THE PROSECUTION WILL PROVIDE THE ACCUSED WITH ACCESS TO EVIDENCE THE PROSECUTION INTENDS TO INTRODUCE AT TRIAL AND WITH ACCESS TO EVIDENCE KNOWN TO THE PROSECUTION THAT IS INCONSISTENT WITH THE ALLEGED GUILT OF THE ACCUSED.

– THE REVIEW PANEL HAS THE AUTHORITY TO RETURN THE CASE FOR FURTHER PROCEEDINGS IF A MAJORITY OF ITS MEMBERS HAVE A DEFINITE AND FIRM CONVICTION THAT A MATERIAL ERROR OF LAW OCCURRED.

– NO INDIVIDUALS HAVE YET BEEN DESIGNATED FOR TRIAL BY MILITARY COMMISSION AND NO MILITARY COMMISSIONS HAVE YET BEEN ESTABLISHED.

– THE U.S. GOVERNMENT REMAINS INTERESTED IN KNOWING AS MUCH DETAIL AS HOST GOVERNMENT CAN PROVIDE ON THE LEGAL STEPS THE HOST GOVERNMENT MAY BE PREPARED TO TAKE

AGAINST YOUR CITIZENS IN U.S. CONTROL AT GUANTANAMO BAY.

Department of Defense Order on Military Commissions

A military commission is a war-time, military tribunal traditionally used to try violations of the laws of war. Under the President's Military Order of November 13, 2001, those tried by military commission may include:

– Members of al Qaeda

– People involved in acts of international terrorism against the United States

– People who knowingly harbored such terrorists

Commission Membership and Selection:

– Commissions will consist of at least 3 but no more than 7 members, with one or two alternates.

– The Secretary of Defense may appoint members and other commission personnel, or select an Appointing Authority to choose commission personnel.

– Commission members are officers in the United States Armed Forces, including reserve personnel, National Guard members, and retired personnel recalled to active duty.

– A Presiding Officer will be chosen from among the commission members to preside over commission proceedings. The Presiding Officer will be a judge advocate of any branch of the armed forces.

– The Presiding Officer has the authority to admit or exclude evidence.

– The Presiding Officer also has the authority to close proceedings to protect classified information or to protect the safety of defendants, witnesses, and commission members.

– A Full and Fair Trial

– A Military defense counsel will be provided for the accused. In addition, the accused may choose their own counsel: another military officer who is a judge advocate of the U.S. Armed Forces or a civilian attorney. Civilian attorneys may be pre-qualified as members of a pool of available attorneys for the defense.

– The defendant and counsel will be able to see copies of the charges in their native language in advance of the trial.

– The accused is presumed innocent until proven guilty.

– The accused may be found guilty only when commission members are convinced of guilt beyond a reasonable doubt.

– The accused may refuse to testify during trial.

– The accused will be able to obtain witnesses and documents to use in his defense.

– The accused may not be tried twice before a military commission for the same offense.

– The accused may enter into a plea agreement.

– Trial Format

– Trial proceedings will be open unless otherwise determined by the Presiding Officer. The Presiding Officer may also allow attendance by the public and press. Photography, video and audio recording and broadcasting will be prohibited.

– A trial may be closed to protect:

  – Classified or sensitive information

  – The physical safety of participants

  – Intelligence or law enforcement sources, methods and activities

  – National security interests

– Commissions will be impartial.

– Evidence, including previous trial testimony and written statements, will be admissible if it would have probative value to a reasonable person.

– Witnesses will testify under oath, and will be subject to direct and cross-examination.

– For witness safety, some testimony may be accepted by phone, through the use of pseudonyms, or during closed proceedings.

– Commission members will deliberate and vote on findings of guilt, innocence, and sentencing in closed conference.

– A conviction requires a vote of two-thirds of the commission.

– A death sentence requires a unanimous vote.

– Sentences may also include life imprisonment or a lesser term, fines and restitution, or any other punishment deemed appropriate.

– A three-member Review Panel, appointed by the Secretary of Defense, will review trial findings within 30 days and either provide a recommendation to the Secretary of Defense or return the case for further proceedings. The panel will include three military officers but may also include civilians temporarily commissioned as military officers.

– Findings and sentences are not final until approved by the President or Secretary of Defense, but findings of "Not Guilty" cannot be changed.

– The procedures may be amended by the Secretary of Defense to accommodate changed circumstances.

BIOGRAPHIC DATA ON DETAINEES

Name: AMIN, OMAR R.
Date Arrived in Guantanamo: 11 January 2000
Date of Birth: 14 June 1967
Nationality: Kuwait
No further information.

Name: AMTIRI, NASSER NAJIRI
Date Arrived in Guantanamo: 7 February 2002
Date of Birth initially reported as: 1977
Date of Birth also reported as: 1978
Nationality: Kuwait
City of Birth: Hamati
Country of Birth: Kuwait
Home City: Hamuti, Kuwait

(Note: two different spellings of apparently same city "Hamati" and "Hamuti")
Language Skills: Arabic
Religion: Muslim
Name of Next of Kin: Najar
Address of Next of Kin: Sabahi, Section 3, Street 3, House 386, Hamati, Kuwait

Name: AL-MUTAYRI, KHALID ABDULLAH MIJSH'AD
Date Arrived in Guantanamo: 9 February 2002
Date of Birth: 18 June 1975
Nationality: Kuwait
City of Birth: Kuwait City
Country of Birth: Kuwait
Home City: Kuwait City, Kuwait
Language Skills: Arabic
Religion: Muslim
Name of Next of Kin: Abdullah Mishad Al-Mutayri
Address of Next of Kin: Section 1, Street 124, House 6, Kuwait City, Kuwait

Name: KAMEL, ABDULLAH KAMEL, ABDULLAH
Date Arrived in Guantanamo: 11 February 2002
Date of Birth: 1973-09-07
Nationality: Kuwait
City of Birth: Hawali
Country of Birth: Kuwait
Home City: Jadah, Kuwait
Language Skills: Arabic, English
Religion: Muslim
Name of Next of Kin: Kamel
Address of Next of Kin: Section 11, 1st Street, Alley 11, House 43, Saba Salim Jada, Kuwait
Name/Address of Notified: Section 11, 1st Street, Alley 11, House 43, Saba Salim Jada, Kuwait

Name: AL AWDA, FOWZI KHALID ABDULLAH
Date Arrived in Guantanamo: 13 February 2002
Date of Birth: 6 June 1977
Nationality: Kuwait
City of Birth: Kuwait City
Country of Birth: Kuwait
Home City: Kuwait City, Kuwait
Language Skills: Arabic, some English
Religion: Muslim
Name of Next of Kin: Khalid
Address of Next of Kin: Qarteba, Third Street, House 13, Kuwait City, Kuwait Name/Address of Notified: Qarteba, Third Street, House 13, Kuwait City, Kuwait

Name: AL-SHAMARI, ABD AL-AZIZ SAYIR
Date Arrived in Guantanamo: 9 February 2002
Date of Birth: 23 September 1973
Nationality initially reported as: Kuwait
Nationality also reported as: Yemen
City of Birth: Fahaheel
Country of Birth: Kuwait
Home City: Airaqa, Kuwait
Language Skills: Arabic
Religion: Muslim
Name of Next of Kin: Sayir
Address of Next of Kin: Airaqa, 21st Street, House 172, Kuwait

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DECLARATION OF THE BLOOD RELATIVES OF THOSE KUWAITI NATIONALS HELD IN UNITED STATES CUSTODY

Pursuant to 28 U.S.C. Section 1746, we depose and say that:

1. We are each the blood relatives of the individuals listed below. Based on our best information and belief, all of those individuals are being held under the custody of the Government of the United States.

2. We have received information from the Government of Kuwait that the U.S. Government has informed it that the following of our family members are being held in U.S. custody at Guantanamo Bay: Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Fawzi Khalid Abdullah Fahad Al Odah and Abdulaziz Sayer Owain Al Shammari.

3. We have also recently received information through the Red Cross and other sources that the remaining five family members are also being held in U.S. custody at Guantanamo Bay: Mohammed Funaitel al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah Abdullah Saleh Ali Al Ajmi and Adil Zamil Abdull Mohssin Al Zamil

4. None of our family members named above is able to contact counsel or submit papers to this or any other court on their own behalf because they are being held virtually incommunicado.

5. Because we are the closest blood relatives of the individuals named below, and because we

deeply love them, we are acting on their behalf to protect their rights and to seek their ultimate release. It is our belief they want us to do so.

6. We have jointly retained Abdul Rahman R. Al-Haroun to secure American counsel and to take whatever steps are necessary to protect our family members' legal rights and to seek their release. Mr. Al-Haroun has our full authority to do so and to take any necessary steps in the courts of the United States to accomplish those goals.

We declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 25, 2002

Name of Detainee	**Family Member's Name & Relationship**	**Signature**
Omar Rajab Amin	Mohammad R. M. R. Ameen (Brother)	/s/ Ameen
Nasser Nijer Naser Al Mutairi	Nayef N. N. B. J. Al Mutairi (Brother)	/s/ Al Mutairi
Khalid Abdullah Mishal Al Mutairi	Meshal A. M. TH Al Mutairi (Brother)	/s/ Al Mutairi
Abdullah Kamal Abdullah Kamal Al Kandari	Mansour K. A. Kamel (Brother)	/s/ A. Kamel
Fawzi Khalid Abdullah Fahad Al Odah	Khaled A. F. Al Odah (Father)	/s/ Al Odah

Abdulaziz Sayer Owain Al Shammari	Sayer O. Z. Al Shammari (Father)	/s/ Al Shammari
Mohammed Funaitel Al Dihani	Mubarak F. S. M. Al Daihani (Brother)	/s/ Al Daihani
Fayiz Mohammad Ahmed Al Kandari	Mohammad A. J. M. H. Al Kandari (Father)	/s/ Al Kandari
Fwad Mahmoud Al Rabiah	Monzer M. H. A. Al Rabieah (Brother)	/s/ Al Rabieah
Abdullah Saleh Ali Al Ajmi	Mesfer Saleh Ali Al Ajmi (Brother)	/s/ Al Ajmi
Adil Zamil Abdull Mohssin Al Zamil	Walid Z. A. Al Zamel (Brother)	/s/ Al Zamel

DECLARATION OF THE BLOOD RELATIVES OF THOSE KUWAITI NATIONALS HELD IN UNITED STATES CUSTODY

Pursuant to 28 U.S.C. section 1746, we depose and say that:

1. I am the brother of Sa'ad Madai Saad Hawash Al Azmi. Based on my best information and belief that my brother being held under the custody of the Government of the United States.

2. I have received information from the Government of Kuwait that the U.S. Government has informed it that my brother being held in U.S. custody at Guantanamo Bay.

3. My brother is not able to contact counsel or submit papers to this or any other court on his own behalf because he is being held virtually incommunicado.

4. Because I am the closest blood relative of Sa'ad M. S. H. Al Azmi, and because I deeply love him, I am acting on his behalf to protect his rights and to seek his ultimate release. It is my belief that he wants me to do so.

5. I have jointly retained Abdul Rahman R. Al-Haroun to secure American counsel and to take whatever steps are necessary to protect my brother's legal rights and to seek his release. Mr. Al-Haroun has my full authority to do so and to take any necessary steps in the courts of the United States to accomplish those goals.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 20, 2002

For and on behalf of Sa'ad Madai Saad Hawash Al Azmi

/s/ Al Azemi
Hamad M. S. H. Al Azemi

Relationship: Brother

GENERAL DOCKET

US Court of Appeals for the DC Circuit

RASUL, et al v. BUSH, et al

9/11/02 CIVIL-US CASE docketed. Notice of Appeal filed by the Appellants Shafiq Rasul, Skina Bibi, Asif Iqbal, Mohammed Iqbal, David Hicks, and Terry Hicks. [701261-1] (jth) [02-5288]

* * *

9/12/02 MOTION filed (5 copies) by Appellants Shafiq Rasul, et al., (certificate of fax/mail service dated 9/12/02) to expedite [701783-1]. (jth) [02-5288]

9/12/02 MOTION filed (5 copies) by Appellants Mamdouh Habib, et al. in 02-5284, and Appellants Shafiq Rasul in 02-5288, et al., in 02-5288 (certificate of fax/mail service dated 9/12/02) to consolidate these cases [701789-1]. [02-5284, 02-5288] (jth) [02-5284 02-5288]

9/13/02 PER CURIAM ORDER filed [701827-1] granting the motion to consolidate No. 02-5284 with No. 02-5288 [701789-1]. It is FURTHER ORDERRED that the motions to expedite [701779-1], [701783-1] be granted. FURTHER ORDERED, on the court's own motion, that consolidated Nos. 02-5284 and 02-5288 be consolidated with No. 02-5251 [701827-1]. FURTHER ORDERED that the following briefing format and schedule apply in all three consolidated cases [701827-3]: Joint Brief for Appellants Habib and Rasul (not to exceed 14,000 words) due on 9/24/02; Brief for Appellant Odah (not to exceed 14,000 words) due on 9/24/02; Joint Appendix due on 9/24/02; Appellees' Brief (not to exceed 14,000 words) due on 10/18/02; Joint Reply Brief for Appellants

Habib and Rasul (not to exceed 7,000 words) due on 10/29/02, Reply Brief for Appellant Odah (not to exceed 7,000 words) due on 10/29/02. Absent extraordinarily compelling circumstances, the court will not grant any modification of these provisions. The parties are directed to file and serve their briefs by hand. The oral argument date and composition of the mertis [sic] panel will be established by separate order. Before Judges: Edwards, Rogers and Tatel. [Entry Date: 9/13/02] [02-5251, 02-5284, 02-5288] (jth) [02-5251 02-5284 02-5288]

* * *

9/13/02 INITIAL SUBMISSIONS filed by Appellees George W. Bush, et al., in No. 02-5288 [702187-1]: Certificate of Counsel. (jth) [02-5288]

9/20/02 CLERK'S ORDER filed [703458] to schedule oral argument [703458-1] before Judge Initials: APR MBG SFW on 12/2/02 at 9:30 AM. [Entry Date: 9/20/02] [02-5251, 02-5284, 02-5288] (cwc) [02-5251 02-5284 02-5288]

9/24/02 BRIEF filed by Appellants Mamdouh Habib, et al in 02-5284, and Appellants Shafiq Rasul, et al in 02-5288 [704213-1]. Copies: 15. Certificate of personal service date 9/24/02. [02-5284, 02-5288] (jlp) [02-5284 02-5288]

9/25/02 JOINT APPENDIX filed [704252-1]. Copies: 10. Certificate of e-mail service dated 9/24/02. [02-5251, 02-5284, 02-5288] (jlp) [02-5251 02-5284 02-5288]

9/30/02 MOTION filed (5 Copies) (certificate of service dated 9/30/02) to allow amicus curiae [705085-1]. Response due on 10/10/02. Motion filed by

Intl Ctr Leg Protc. [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/1/02 NOTICE filed of intention to participate as amicus curiae [705156-1] by Bar Human Rights Com, et al. Certificate of service date 9/30/02. [02-5284, 02-5288] (sha) [02-5284 02-5288]

10/1/02 BRIEF filed by Amicus Curiae for Appellant Bar Human Rights Com, et al. [705161-1]. Copies: 14. Certificate of service date 9/30/02. [02-5284, 02-5288] (sha) [02-5284 02-5288]

10/7/02 NOTICE filed of intention to participate as amicus curiae [706580-1] by Natl Assn Cr Def Law in 02-5288 styled as "Notice of Motion and Motion for Leave to File Brief as Amicus Curiae". Certificate of service date 10/7/02. (sha) [02-5288]

10/7/02 BRIEF lodged by Amicus Curiae for Appellant Natl Assn Cr Def Law in 02-5288 [706585-1]. Copies: 7. Certificate of service date 10/7/02. (sha) [02-5288]

10/8/02 CORRECTED BRIEF filed by Amicus Curiae for Appellant Natl Assn Cr Def Law in 02-5288 [706746-1]. Copies: 15. Certificate of service date 10/7/02. (sha) [02-5288]

10/17/02 PER CURIAM ORDER filed [708343] denying non-party motion to allow amicus [705085-1] filed by Intl Ctr Leg Protc, without prejudice to renewal upon the submission, within 7 days of the date of this order, of a brief signed by a member of the Bar of this court. [707626-1]. Before Judges Randolph, Garland, Williams. [Entry Date: 10/17/02] [02-5251, 02-5284, 02-5288] (cwc) [02-5251 02-5284 02-5288]

10/18/02 BRIEF filed by Appellee USA, et al. [708807-1]. Copies: 15. Certificate of service date 10/18/02. [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/18/02 SUPPLEMENTAL APPENDIX lodged by Appellee USA, et al. [708809-1]. Copies: 10. Certificate of service date 10/18/02. [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/21/02 MOTION filed (5 Copies) by Appellee USA, et al. (Certificate of service dated 10/21/02) for leave to file [708897-1] a supplemental appendix [708809-1]. [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/24/02 MOTION filed (5 Copies) (certificate of service dated 10/24/02) to allow amicus curiae [710058-1]. Motion filed by Intl Ctr Leg Protc [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/24/02 BRIEF lodged by Movant-Amicus Curiae-Appellant Intl Ctr Leg Protc [710060-1]. Copies: 15. Certificate of service date 10/24/02. [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

10/25/02 NOTICE filed of intention to participate as amicus curiae [711010-1] by WA Leg Fdn, Allied Educ Fdn, Jewish Inst Natl Sec in 02-5284 and 02-5288. (sha) [02-5284 02-5288]

10/25/02 BRIEF filed by Amicus Curiae for Appellee WA Leg Fdn, et al. in 02-5284 and 02-5288 [711015-1]. Copies: 15. Certificate of service date 10/25/02. [02-5284, 02-5288] (sha) [02-5284 02-5288]

10/29/02 CORRECTED BRIEF filed by Appellants Mamdouh Habib, et al. in 02-5284 and 02-5288 [710996-1]. Copies: 15. Certificate of service date 10/29/02. [02-5284, 02-5288] (sha) [02-5284 02-5288]

10/29/02 REPLY BRIEF filed by Appellants Mamdouh Habib, et al. in 02-5284 and 02-5288 [710997-1]. Copies: 15. Certificate of service date 10/29/02. [02-5284, 02-5288] (sha) [02-5284 02-5288]

11/13/02 CLERK'S ORDER filed [713263] granting appellees' motion for leave to file a supplemental appendix and granting motion of the International Centre for the Legal Protection of Human Rights for leave to file an amicus curiae brief; Clerk directed to file the lodged supplemental appendix and the lodged brief. [710058-1] [708897-1] [710060-1] [708809-1] [Entry Date: 11/13/02] [02-5251, 02-5284, 02-5288] (cwc) [02-5251 02-5284 02-5288]

11/13/02 PER ABOVE ORDER lodged supplemental appendix is filed. [708809-1] [02-5251, 02-5284, 02-5288] (cwc) [02-5251 02-5284 02-5288]

11/13/02 PER ABOVE ORDER lodged brief of amicus curiae is filed. [02-5251, 02-5284, 02-5288] (cwc) [02-5251 02-5284 02-5288]

11/19/02 LETTER filed by Appellants Khaled A. F. Al Odah, et al., pursuant to FRAP 28j advising of additional authorities [715282-1]. Certificate of service date 11/19/02. [02-5251, 02-5284, 02-5288] (cwc) [02-5251 02-5284 02-5288]

11/21/02 PER CURIAM ORDER filed [715254] to allocate oral argument times: APET minutes-15 ERES minutes-15. [715254-1], one counsel per side to argue. [715254-2] Oral argument

scheduled for 12/2/02, Form 72 notice of attorney arguing case – [715254-3] due 11/26/02. [Entry Date: 11/21/02] [02-5251] (cwc) [02-5251 02-5284 02-5288]

11/22/02 MOTION filed (5 copies) by Appellants Khaled A. F. Al Odah, et al., in No. 02-5251, (certificate of mail service dated 11/22/02) to permit two counsel for appellants to present oral argument and for additional argument time [715948-1]. [02-5251, 02-5284, 02-5288] (jth) [02-5251 02-5284 02-5288]

* * *

11/25/02 MOTION filed (5 copies) by Appellants Mamdouh Habib, et al. in 02-5284 and Appellants Maha Habib, et al. in 02-5284, (certificate of service dated 11/25/02) to enlarge oral argument and to allow separate argument from appellant's in case No. 02-5251 [716113-1]. [02-5284, 02-5288] (sha) [02-5284 02-5288]

11/26/02 PER CURIAM ORDER filed [716447] denying motion of appellants Rasul, et al. and Habib to enlarge oral argument and to allow separate argument from appellants in 02-5251; Granting motion of appellants Al Odah, et al. to permit two counsel for appellants to present oral argument and for additional time; The following revised allocation of argument times shall now apply: Appellants Al Odah, et al. – 10 minutes; Appellants Rasul, et al. and Habib – 10 minutes; Appellees – 20 minutes. [716113-1] [715948-1] [716447-1] [Entry Date: 11/26/02] [02-5251, 02-5284, 02-5288] (cwc) [02-5251 02-5284 02-5288]

* * *

12/2/02 ORAL ARGUMENT HELD before Randolph, Garland, Williams. [02-5251, 02-5284, 02-5288] (set) [02-5251 02-5284 02-5288]

12/17/02 TRANSCRIPT of oral argument held on 12/2/02. [701259-1] [02-5251, 02-5284, 02-5288] (sha) [02-5251 02-5284 02-5288]

2/11/03 TRANSCRIPT of oral argument held on 12/2/02. [701259-1] [02-5251, 02-5284, 02-5288] (jth) [02-5251 02-5284 02-5288]

3/11/03 JUDGMENT that the judgment of the district court dismissing the complaint in No. 02-5251 and the petitions for habeas corpus in Nos. 02-5284 and 02-5288 for lack of jurisdiction is affirmed for the reasons in the accompanying opinion. Before Judges Randolph, Garland, Williams. [Entry Date: 3/11/03] [02-5251, 02-5284, (mcm) [02-5251 02-5284 02-5288]

3/11/03 OPINION filed [737182] (18 pgs) for the Court by Judge Randolph, CONCURRING OPINION (9 pgs) filed by Judge Randolph [02-5251, 02-5284, 02-5288] (mcm) [02-5251 02-5284 02-5288]

3/11/03 CLERK'S ORDER filed [737183] The Clerk is directed to withhold issuance of the mandate [737183-1] pending disposition of any timely petition for rehearing. [Entry Date: 3-11-03] [02-5251, 02-5284, 02-5288] (mcm) [02-5251 02-5284 02-5288]

4/25/03 PETITION for rehearing [746029-1], Petition for Rehearing en banc [746029-2] in Case No. 02-5251 (20 copies) filed by Appellants Khaled A. F. al Odah, et al., in No. 02-5251. (certificate of hand-delivery service dated 4/25/03). [02-5251, 02-5284, 02-5288] (jth) [02-5251 02-5284 02-5288]

4/25/03 PETITION for rehearing [746031-1], PETITION for rehearing en banc [746031-2] in Nos. 02-5284, 02-5288 (20 copies) filed by Appellants Mamdouh Habib, et al., in appeal No. 02-5284, and by Appellants in Shafiq Rasul, et al., in No. 02-5288 (certificate of hand-delivery service dated 4/25/03) [02-5251, 02-5284, 02-5288] (jth) [02-5251 02-5284 02-5288]

6/2/03 PER CURIAM ORDER, In Banc, filed [752207] denying suggestion rehearing en banc [746029-2] filed by Khaled A. F. Al Odah, et al. Before Judges Ginsburg, Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Williams. [Entry Date: 6/2/03] [02-5251, 02-5284, 02-5288] (mcm) [02-5251 02-5284 02-5288]

6/2/03 PER CURIAM ORDER filed [752209] denying petition rehearing [746029-1] filed by Khaled A. F. Al Odah, et al. Before Judges Randolph, Garland, Williams. [Entry Date: 6/2/03] [02-5251, 02-5284, 02-5288] (mcm) [02-5251 02-5284 02-5288]

6/2/03 PER CURIAM ORDER, In Banc, filed [752211] denying suggestion rehearing en banc [746031-2] filed by Mamdouh Habib, et al. Before Judges Ginsburg, Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Williams. [Entry Date: 6/2/03] [02-5251, 02-5284, 02-5288] (mcm) [02-5251 02-5284 02-5288]

6/2/03 PER CURIAM ORDER filed [752213] denying petition rehearing [746031-1] filed by Mamdouh Habib, et al. (Mandate may on or after 6/10/03 in 02-5251, et al.) Before Judges Randolph, Garland, Williams. [Entry Date: 6/2/03] [02-5251, 02-5284, 02-5288] (mcm) [02-5251 02-5284 02-5288]

6/23/03 MANDATE ISSUED to Clerk, District Court [755787-1] [02-5251, 02-5284, 02-5288] (mcm) [02-5251 02-5284 02-5288]

9/8/03 NOTICE filed by Clerk, US Supreme Court tha [sic] a petition for writ of certiorari was file [sic] in this case on 9/2/03 and placed on the docket as No. 03-334 [771159-1]. [02-5251, 02-5284, 02-5288] (jlp) [02-5251 02-5284 02-5288]

9/10/03 NOTICE filed by Clerk, Supreme court adivsing [sic] of the filing on 9/2/03 and docketing on 9/5/03 of a petition for writ of certiorari [772035-1]. Supreme Court Docket No. 03-343. [02-5251, 02-5284, 02-5288] (jth) [02-5251 02-5284 02-5288]

11/14/03 NOTICE filed by Clerk, Supreme Court advising of the entry of an order on 11/10/03, granting the petition for writ of certiorari, limited to the following question: Whether United States Courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at he [sic] Guantanamo Bay Naval Base, Cuba. This case is consolidated with No. 03-343 (Al Odah, et al. v. USA, et al.) and a total of 1 hour is allotted for oral argument [785121-1]. SUPREME COURT DOCKET NUMBER 03-334. [02-5251, 02-5284, 02-5288] (jth) [02-5251 02-5284 02-5288]

11/14/03 NOTICE filed by Clerk, Supreme Court advising of the entry of an order on 1/10/03, granting the petition for writ of certiorari, limited to the following question: Whether United States Courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with

hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba. This case is consolidated with No. 03-334 (Rasul v. Bush) and a total of one (1) hour is allotted for oral argument [785336-1]. SUPREME COURT'S DOCKET NUMBER IS 03-343. [02-5251, 02-5284, 02-5288] (jth) [02-5251 02-5284 02-5288]

U.S. District Court

USDC District of Columbia (Washington)

CIVIL DOCKET FOR CASE #: 02-CV-299

RASUL, et al v. BUSH, et al

DATE	#	DOCKET ENTRY
2/19/02	1	PETITION filed by petitioner SHAFIQ RASUL, petitioner SKINA BIBI, petitioner ASIF IQBAL, petitioner MOHAMMED IQBAL, petitioner DAVID HICKS, petitioner TERRY HICKS for writ of habeas corpus; affidavits (6), exhibits (6) (cdw) [Entry date 02/20/02] [1:02cv299]
		* * *
2/21/02	14	RETURN OF SERVICE/AFFIDAVIT of petition for writ of habeas corpus executed on 2/19/02 upon respondent GEORGE WALKER BUSH, respondent DONALD RUMSFELD, respondent MICHAEL LEHNERT, respondent TERRY CARRICO (cdw) [Entry date 02/26/02] [1:02cv299]
2/21/02	15	RETURN OF SERVICE/AFFIDAVIT of petition for writ of habeas corpus executed upon U.S. Attorney on 2/19/02 (cdw) [Entry date 02/26/02] [Edit date 02/26/02] [1:02cv299]
2/21/02	16	RETURN OF SERVICE/AFFIDAVIT of petition for writ of habeas corpus executed upon U.S. Attorney General on 2/19/02 (cdw) [Entry date 02/28/02] [1:02cv299]

2/25/02	7	ORDER by Judge Colleen Kollar-Kotelly: that pursuant to 28 USC 2243, respondents, by counsel, shall file with the Court and serve on petitioners' attorneys, a return certifying the true cause of the petitioners' detention on 3/18/02. This return shall show cause why a writ of habeas corpus and the relief sought by petitioners should not be granted. Petitioners, by counsel, shall file with the Court and serve on petitioners' attorneys a reply brief not later than 4/8/02. Any motion relating to providing notice of this matter to petitioners and providing access of counsel to petitioners should be filed with the Court and served on respondents' attorneys, by petitioners, through counsel, not later than 3/4/02. An opposition to any motion relating to providing notice of this matter to petitioners and providing access of counsel to petitioners shall be filed with the Court and served on petitioners' attorneys, by respondents, through counsel, not later than 3/18/02. Respondents' return to petitioners' writ of habeas corpus may serve as the appropriate brief to file such opposition. A reply relating to providing notice of this matter to petitioners and providing access of counsel to petitioners should be filed with the Court and served on respondents' attorneys, by petitioners, through cousel, not later than 4/8/02. A copy of the petition shall be served upon respondents through the United States Attorney for the District of Columbia by hand delivery to Roscoe C. Howard, Jr. at the Office of the United States Attorney for the District of Columbia, 555 Fourth Street, NW, Washington, DC

20001, by the close of business on Wednesday, February 27, 2002. All filings in this case shall be served on counsel by hand delivery. Petitioners shall hand deliver filings to Roscoe C. Howard, Jr., at the Office of the United States Attorney for District of Columbia, 555 Fourth Street, NW, Washington, DC 20001. Respondents shall hand deliver filings to L. Barrett Boss, Asbill, Junkin, Moffitt & Boss, Chartered, Suite 200, 1615 New Hampshire Avenue, NW, Washington, DC 20009. The Court shall promptly be provided with a courtesy copy, in Chambers, of all filings in the above-captioned matter. (N) (dot) [1:02cv299]

* * *

2/25/02 20 NOTICE OF FILING by petitioner SHAFIQ RASUL cover letters dated 2/19/02 addressed to defendants and non-parties US Attorney, US Attorney General (cdw) [Entry date 02/27/02] [1:02cv299]

* * *

3/1/02 28 MOTION filed by petitioners for access to counsel (cdw) [Entry date 03/26/02] [1:02cv299]

3/4/02 27 MOTION filed by petitioners for order to provide the detained clients with notice of the pending litigation (cdw) [Entry date 03/26/02] [1:02cv299]

3/12/02 22 MOTION filed by petitioners for leave to file an amended petition for a writ of habeas corpus; EXHIBIT (AMENDED PETITION) (cdw) [Entry date 03/14/02] [1:02cv299]

3/15/02 24 TRANSCRIPT of telephone conference filed for date(s) of 2/25/02. Reporter: Edward N.

Hawkins, RMR (cdw) [Entry date 03/21/02] [1:02cv299]

3/18/02 23 ORDER by Judge Colleen Kollar-Kotelly: granting motion for leave to file an amended petition for a writ of habeas corpus [22-1] by petitioners. The Petitioners first amended petition for a writ of habeas corpus is accepted for filing in place of the petition previously filed on 2/19/02. (N) (dot) [1:02cv299]

3/18/02 25 FIRST AMENDED PETITION filed by petitioners for writ of habeas corpus; attachments (cdw) [Entry date 03/21/02] [1:02cv299]

3/18/02 26 MOTION filed by respondents to dismiss first amended petition for writ of habeas corpus [25-1]; exhibits (1) (cdw) [Entry date 03/21/02] [1:02cv299]

3/18/02 29 RESPONSE by respondents in opposition to motion for order to provide the detained clients with notice of the pending litigation [27-1] by petitioners; motion for access to counsel [28-1] by petitioners (cdw) [Entry date 03/26/02] [1:02cv299]

4/1/02 30 MOTION (UNOPPOSED) filed by petitioner SHAFIQ RASUL to continue briefing schedule to 4/15/02 (bcs) [Entry date 04/02/02] [1:02cv299]

4/3/02 31 ORDER by Judge Colleen Kollar-Kotelly: granting motion to continue briefing schedule to 4/15/02 [30-1] by SHAFIQ RASUL; reply to motion due 4/15/02. (N) (dot) [1:02cv299]

4/15/02 32 MEMORANDUM by petitioner in opposition to motion to dismiss first amended petition for writ of habeas corpus [25-1] [26-1] by TERRY CARRICO, MICHAEL LEHNERT,

DONALD RUMSFELD, GEORGE WALKER BUSH; exhibit (1) (bcs) [Entry date 04/16/02] [1:02cv299]

4/17/02 34 MOTION filed by respondent to extend time to 4/29/02 to file a reply to petitioners memorandum in opposition to respondents motion to dismiss (bcs) [Entry date 04/22/02] [1:02cv299]

4/22/02 33 ORDER by Judge Colleen Kollar-Kotelly: granting respondent's unopposed motion to file reply to petitioner's memorandum in opposition to respondent's motion to dismiss. Respondents shall filed their reply to petitioners' memorandum in opposition to respondents's motion to dismiss not later than 4/29/02. (N) (dot) [1:02cv299]

4/29/02 35 REPLY by respondents to response in opposition to motion to dismiss first amended petition for writ of habeas corpus [25-1] [26-1] by TERRY CARRICO, MICHAEL LEHNERT, DONALD RUMSFELD, GEORGE WALKER BUSH (bcs) [Entry date 04/30/02] [1:02cv299]

6/14/02 36 ORDER by Judge Colleen Kollar-Kotelly: motion hearing set for 2:00 6/26/02 on respondents' motion to dismiss. The parties' arguments shall be solely focused upon the issue of whether the Court has jurisdiction to entertain petitioners habeas filing. Petitioners and respondents shall each be allotted one half-hour for oral argument. (N) (dot) [1:02cv299]

* * *

6/24/02 37 ORDER by Judge Colleen Kollar-Kotelly: that respondents will speak first and are allotted 20 minutes for prepared comments that addrss [sic] the merits of their motions to dismiss in this case and in the case of ODAH v. UNITED STATES, Civ. No. 02-828. Petitioners will speak second and are allotted fifteen minutes for prepared comments. Petitioners should consult plaintiffs' counsel in ODAH, who will speak third, to ensure that petitioners' comments are not duplicative of those made by plaintiffs' counsel in ODAH. Respondents will be given an appropriate opportunity to respond to the arguments made by petitioners in this matter and plaintiffs in ODAH. (N) (dot) [Entry date 06/25/02] [1:02cv299]

* * *

6/26/02 – STATUS HEARING before Judge Colleen Kollar-Kotelly: hearing held and taken under advisement Reporter: Edward Hawkins (dot) [Entry date 07/01/02] [1:02cv299]

* * *

7/30/02 41 ORDER by Judge Colleen Kollar-Kotelly: granting motion to consolidate cases for pretrial proceedings to case 02-299 [3-1] by FAWZI KHALID AL ODAH in 1:02-cv-00828. The Court consolidates ODAH v. UNITED STATES, Civil Action No. 02cv828, with RASUL v. BUSH, Civil Action No. 02cv299, for the limited purpose of addressing the Court's jurisdiction to hear these matters. (N) (dot) [Entry date 07/31/02] [1:02cv299 1:02cv828]

7/30/02 42 MEMORANDUM OPINION by Judge Colleen Kollar-Kotelly (N) (dot) [Entry date 07/31/02] [1:02cv299 1:02cv828]

7/30/02 43 ORDER by Judge Colleen Kollar-Kotelly: granting motion to dismiss first amended petition for writ of habeas corpus [25-1] [26-1] by TERRY CARRICO, MICHAEL LEHNERT, DONALD RUMSFELD, GEORGE WALKER BUSH in 1:02-cv-00299. Granting motion to dismiss plaintiffs' motion for preliminary injunction [9-1] and complaint [1-1]. [15-1] by federal defendants in 1:02-cv-00828. RASUL v BUSH, 02cv299, and ODAH v. UNITED STATES, 02cv828, are dismissed with prejudice. (N) (dot) [Entry date 07/31/02] (1:02cv299 1:02cv828]

7/30/02 – Post Arument brief filed by plaintiffs in 1:02-cv-00828, correcting erroneous statements by defense counsel at oral argument.; exhibits (3) (aet) [Entry date 08/02/02] [1:02cv828]

8/2/02 – NOTICE OF APPEAL by plaintiffs in 1:02-cv-00828 from order [30-1], entered on: 7/30/02. Copies sent. No fees paid. (COPY) (aet) [Entry date 08/08/02]. [Edit date 08/08/02] [1:02cv828]

* * *

8/8/02 – TRANSCRIPT filed for date(s) of 6/26/02. Reporter: Edward Hawkins (aet) [Entry date 08/09/02] [1:02cv828]

* * *

9/9/02 44 NOTICE OF APPEAL by petitioners SHAFIQ RASUL in 1:02-cv-00299, SKINA BIBI, ASIF IQBAL, MOHAMMED IQBAL, DAVID HICKS, TERRY HICKS from order [43-1], order [41-1], entered on: 7/30/02. Fees paid. Copies sent. (aet) [Entry date 09/11/02] [1:02cv299]

9/12/02 – USCA # 02-5288 assigned for appeal [44-1] by petitionersssss [sic] (aet) [Entry date 09/16/02] [1:02cv299]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL,
Detainee, Camp X-Ray
Guantanamo Bay Naval Base
Guantanamo Bay, Cuba

SKINA BIBI,
as Next Friend of Shafiq Rasul
14 Inverness Street
London NW1 7HJ
United Kingdom

ASIF IQBAL,
Detainee, Camp X-Ray
Guantanamo Bay Naval Base
Guantanamo Bay, Cuba

MOHAMMED IQBAL,
as Next Friend of Asif Iqbal
14 Inverness Street
London NWl 7HJ
United Kingdom

DAVID HICKS,
Detainee, Camp X-Ray
Guantanamo Bay Naval Base
Guantanamo Bay, Cuba

TERRY HICKS,
as Next Friend of David Hicks
345 King William Street
Adelaide, SA 5000

Petitioners,

v.

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

No. CV: 02-0299 (CKK)

GEORGE WALKER BUSH,
President of the United States
The White House
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

DONALD RUMSFELD,
Secretary, United States
Department of Defense
1000 Defense Pentagon
Washington, D.C. 20301-1000

BRIGADIER GEN. MICHAEL LEHNERT,
Commander, Joint Task Force-160
Guantanamo Bay Naval Base
Guantanamo Bay, Cuba

COLONEL TERRY CARRICO,
Commander, Camp X-Ray,
Guantanamo Bay Naval Base
Guantanamo Bay, Cuba

Respondents
All sued in their official and individual capacities

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

1. Petitioners Shafiq Rasul, Asif Iqbal, and David Hicks seek the Great Writ. They act on their own behalf and through their Next Friends: Skina Bibi acts for her son Shafiq Rasul, Mohammed Iqbal acts for his son Asif, and Terry Hicks acts for his son David. David Hicks is a citizen of Australia. Mr. Iqbal and Mr. Rasul are citizens of the United Kingdom. They are being held virtually *incommunicado* in respondents' unlawful custody.

I.

JURISDICTION

2. Petitioners bring this action under 28 U.S. C. §§2241 and 2242, and invoke this Court's jurisdiction under 28 U.S.C. §§1331, 1350, 1651, 2201, and 2202; 5 U.S.C. §702; as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the International Covenant on Civil and Political Rights ("ICCPR"), the American Declaration on the Rights and Duties of Man ("ADRDM"), and Customary International Law. Because they seek declaratory relief, Petitioners also rely on F. R. Civ. P. 57.

3. This Court is empowered under 28 U.S.C. §2241 to grant the Writ of Habeas Corpus, and to entertain the Petition filed by Terry Hicks, Mohammed Iqbal, and Skina Bibi as Next Friend under 28 U.S.C. §2242. This Court is further empowered to declare the rights and other legal relations of the parties herein by 28 U.S.C. §2201, and to effectuate and enforce declaratory relief by all necessary and proper means by 28 U.S.C. §2202, as this case involves an actual controversy within the Court's jurisdiction.

II.

VENUE

4. Venue is proper in the United States District Court for the District of Columbia, since at least one respondent resides in the district, a substantial part of the events or omissions giving rise to the claim occurred in the district, at least one respondent may be found in the

district, and all respondents are either officers or employees of the United States or any agency thereof acting in their official capacities. 28 U.S.C. §§1391(b); 1391(e).

III.

PARTIES

5. Petitioner David Hicks is an Australian citizen presently incarcerated and held in respondents' unlawful custody at Camp X-Ray, United States Naval Base, Guantanamo Bay, Cuba. *See* Exhibit A, Birth Certificate of David Hicks.

6. Petitioner Terry Hicks is David Hicks' father. He too is an Australian citizen. Terry Hicks has received a letter from his son, delivered through the Australian Red Cross, asking for legal assistance. Because his son cannot secure access either to legal counsel or the courts of the United States, the elder Mr. Hicks acts as Next Friend. *See* Exhibit B, Affidavit of Terry Hicks, incorporated by reference herein.

7. Through counsel, Terry Hicks has tried repeatedly to contact his son, and to learn more about his condition and status. The United States has either rebuffed or ignored counsel's requests. In a letter dated January 17, 2002, for instance, Steven Kenny, Australian counsel for Terry and David Hicks, asked the Australian Government to confirm, *inter alia,* whether David Hicks was being held at Guantanamo, whether the United States intended to charge him with any offense, and whether the Australian Government could work with counsel to secure representation for Mr. Hicks. In the same letter, Mr. Kenny asked the Australian Government to "arrange contact between David

and his family." *See* Exhibit C, Affidavit of Stephen Kenny, Australian Counsel for Petitioners; Letter from Stephen Kenny to Hon. Daryl Williams, Attorney-General (Jan. 17, 2002), all correspondence incorporated herein by reference. The following day, the Australian Government advised counsel that Mr. Hicks was being held in Guantanamo, that he "does not currently have legal representation due to the nature and circumstances of his detention," and that "the matter of access to Mr. Hicks by his family" was "ultimately a matter for the United States." *Id.* at Letter from Robert Cornall, Attorney-General's Department (Jan. 18, 2002).

8. Mr. Kenny responded the same day, repeating his request for information about Mr. Hicks, and seeking the assistance of the Australian Government "with a view to arranging" legal advice for Mr. Hicks. On February 1, 2002,. Mr. Kenny renewed his request for "access by [Terry Hicks] to his son. He wishes to see his son face to face but would appreciate being able to make even a telephone call to him. Will you please make a direct request to the United States authorities for such a meeting." *Id.* at Letter from Stephen Kenny (Feb. 1, 2002). On February 8, 2002, the Australian Government left no doubt that David Hicks, and all detainees, were cut off:

> Your request for Mr. Hicks' family to have access to him was referred to the United States authorities. *The United States has advised that, at this stage, no family access will be allowed any of the detainees held at Guantanamo Bay.*

Id. at Letter from Robert Cornall (Feb. 8, 2002) (emphasis added).

9. In addition to his correspondence with the Australian Government, on January 25, Mr. Kenny wrote to President Bush, asking, *inter alia,* if he would "permit David to be seen by legal counsel," and if he would allow Terry Hicks "to have contact with his son." To date, the United States Government has not responded to this request.

10. Petitioner Asif Iqbal is a citizen of the United Kingdom presently incarcerated and held in respondents' unlawful custody at Camp X-Ray, Guantanamo Bay Naval Station, Guantanamo Bay, Cuba. *See* Exhibit D, Birth Certificate of Asif Iqbal.

11. Petitioner Mohammed Iqbal is Asif Iqbal's father. He too is a British citizen. Mohammed Iqbal received a telephone call from the Foreign and Commonwealth Office on January 21, 2002, during which he was informed that his son was being detained in Guantanamo Bay. Because his son cannot secure access either to legal counsel or the courts of the United States, Mohammed Iqbal acts as his Next Friend. *See* Exhibit E, Affidavit of Mohammed Iqbal, incorporated by reference herein.

12. Through counsel, Mohammed Iqbal has attempted to gain access to his son. The United States has declined to accede to counsel's requests. *See* Exhibit F, First Affidavit of Gareth Peirce, United Kingdom Counsel for Petitioners Asif and Mohammed Iqbal and Shafiq Rasul and Skina Bibi.

13. The British Foreign and Commonwealth Office advised Ms. Peirce that any request for access to Mr. Iqbal must be made to the United States Ambassador in London. Immediately upon receiving instructions from Mr Iqbal's family, on January 25, 2002, Ms. Peirce telephoned

and also sent a faxed request to the Ambassador, seeking immediate access to Mr. Iqbal in Guantanamo Bay in order to provide legal advice. In addition, she asked the Foreign and Commonwealth Office in London to pursue this request directly with the United States government. Ms. Peirce has been advised by the Foreign and Commonwealth Office that this request has been passed to the United States government on behalf of Mr Iqbal, together with requests by Mr Iqbal's Member of Parliament that he and Mr Iqbal's family be permitted access to him. Counsel is advised by the Foreign and Commonwealth Office that as of February 13, 2002, these requests have not received a response, and nor has a request for further consular access to Mr Iqbal, i.e. a second consular visit, been granted.

14. Petitioner Shafiq Rasul is a citizen of the United Kingdom presently incarcerated and held in respondents' unlawful custody at Camp X-Ray, Guantanamo Bay Naval Station, Guantanamo Bay, Cuba. *See* Exhibit G, Birth Certificate of Shafiq Rasul.

15. Petitioner Skina Bibi is Shafiq Rasul's mother. She too is a British citizen. Ms. Bibi received a telephone call from the Foreign and Commonwealth Office on January 21, 2002, during which she was informed that her son was being detained in Guantanamo Bay. Skina Bibi has also received news of a message from her son, delivered through the Red Cross, asking for legal representation. Because her son cannot secure access either to legal counsel or the courts of the United States, she acts as his Next Friend. *See* Exhibit H, Affidavit of Skina Bibi, incorporated by reference herein.

16. Through counsel, Skina Bibi has attempted to gain access to her son. The United States has declined to accede to counsel's requests. *See* Exhibit I, Second Affidavit of Gareth Peirce, United Kingdom Counsel for the Petitioners Asif and Mohammed Iqbal and Shafiq Rasul and Skina Bibi.

17. The British Foreign and Commonwealth Office advised Ms. Peirce that any request for access to Mr. Rasul must be made to the United States Ambassador in London. Immediately upon receiving instructions from Mr. Rasul's family, on January 25, 2002, Ms. Peirce telephoned and also sent a faxed request to the Ambassador, seeking immediate access to Mr. Rasul in Guantanamo Bay in order to provide legal advice. In addition, she asked the Foreign and Commonwealth Office in London to pursue this request directly with the United States government. Ms. Peirce has been advised by the Foreign and Commonwealth Office that this request has been passed to the United States government on behalf of Mr. Rasul, together with requests by Mr. Rasul's Member of Parliament that he and Mr. Rasul's family be permitted access to him. Counsel is advised by the Foreign and Commonwealth Office that as of February 13, 2002, these requests have not received a response, and nor has a request for further consular access to Mr Rasul, i.e. a second consular visit, been granted.

18. Respondent Bush is the President of the United States and Commander in Chief of the United States Military. He is the author of the Order directing that David Hicks, Asif Iqbai, and Shafiq Rasul be detained, and is ultimately responsible for their unlawful detention. He is sued in his official and personal capacities.

19. Respondent Rumsfeld is the Secretary of the United States Department of Defense. Pursuant to the Order described in Para. 18, respondent Rumsfeld has been charged with maintaining the custody and control of the detained petitioners. Respondent Rumsfeld is sued in his official and personal capacities.

20. Respondent Lehnert is the Commander of Joint Task Force-160, the task force running the detention operation at the Guantanamo Naval Station, Guantanamo Bay, Cuba. He has supervisory responsibility for the detained petitioners and is sued in his official and personal capacities.

21. Respondent Carrico is the Commandant of Camp X-Ray, where the detained petitioners are presently held. He is the immediate custodian responsible for their detention, and is sued in his official and personal capacities.

IV.

STATEMENT OF FACTS

22. The detained petitioners are not, nor have they ever been, enemy aliens or unlawful combatants. David Hicks is an Australian citizen in respondents' unlawful custody. At the time of his seizure by the United States Government, Mr. Hicks was living in Afghanistan.

23. Petitioner Asif Iqbal is a UK citizen in respondent's unlawful custody. In July, 2001, Iqbal's family arranged for him to marry a woman living in the same village in Pakistan as Iqbal's father. He left Britain after September 11, 2001, and traveled to Pakistan solely for the purpose of this arranged marriage. In early October,

2001, shortly before the arranged marriage, Petitioner Iqbal's father allowed him to leave the village briefly. On information and belief, after he left the village, Petitioner Iqbal was captured and kidnapped by groups working in opposition to the United States in Afghanistan and Pakistan.

24. Petitioner Shafiq Rasul is a UK citizen in respondents' unlawful custody. In the summer of 2001, Petitioner Rasul decided to take time off from his computer engineering degree to travel. His brother persuaded him to visit Pakistan. Petitioner Rasul traveled to Pakistan to visit relatives and explore his culture. He also hoped to continue his education, and wanted to find computer courses equivalent to, but more reasonably priced, than those he could take in Britain. He left Britain after September 11, 2001, and traveled to Pakistan solely for these purposes. Following his arrival in Pakistan, he stayed with an aunt in Lahore before beginning further travel in the country. On information and belief, after he left Lahore, Petitioner Rasul was captured and kidnapped by groups working in opposition to the United States in Afghanistan and Pakistan.

Petitioners' Seizure By The United States

25. In the wake of September 11, 2001, the United States, at the direction of respondent Bush, began a massive military campaign against the Taliban, then in power in Afghanistan. On September 18, 2001, a Joint Resolution of Congress authorized the President to use force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such

organizations or persons." Joint Resolution 23, Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224 (Jan. 18, 2001). The Resolution did not authorize the indefinite detention of persons seized on the field of battle.

26. In the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely knit coalition of Afghani and other military groups opposed to the Taliban Government. On information and belief, no American casualties were caused by the Taliban prior to when Mr. Hicks, Mr. Iqbal, and Mr. Rasul were apprehended, and the detained petitioners neither caused nor attempted to cause any harm to American personnel prior to their capture.

27. On or about December 9, 2001, the precise date unknown to counsel but known to respondents, the Northern Alliance captured David Hicks in Afghanistan. On or about December 17, 2001, the Northern Alliance transferred him to the custody of the United States military. *See* Exhibit J, Joint News Release of the Australian Attorney General and the Minister for Defense (December 17, 2001). David Hicks has been held in United States custody since that time.

28. No proper or adequate information has been provided by the United States government as to the date or circumstances of Mr. Iqbal's and Mr. Rasul's seizure by U.S. forces. The precise date of their capture by U.S. forces is unknown to counsel but known to respondents. On information and belief, they have been held in United States custody since early December, 2001.

29. The detained petitioners are not, and have never been, members of Al Qaida or any other terrorist group. Prior to their detention, they did not commit any violent act against any American person, nor espouse any violent act against any American person or property. On information and belief, they had no involvement, direct or indirect, in either the terrorist attacks on the United States September 11, 2001, or any act of international terrorism attributed by the United States to al Qaida or any terrorist group. They are not properly subject to the detention Order issued by respondent Bush, and discussed *infra* in Paras. 34-38.

30. On information and belief, the detained petitioners at no time voluntarily joined any terrorist force. On information and belief, if any of the detained petitioners ever took up arms in the Afghani struggle, it was only on the approach of the enemy, when they spontaneously took up aims to resist the invading forces, without having had time to form themselves into regular armed units, and carrying their arms openly and respecting all laws and customs of war.

31. On information and belief, the detained petitioners were not initially taken into custody by American forces. They were taken into custody against their will, and handed over to the Americans. There is no evidence they engaged in combat against American forces, On information and belief, if the detained petitioners were ever in Afghanistan prior to being taken involuntarily into custody, it was in order to facilitate humanitarian assistance to the Afghani people. The detained petitioners have taken no step that was not fully protected as their free exercise of their religious and personal beliefs.

32. On information and belief, the detained petitioners promptly identified themselves by correct name and nationality to the United States. They requested that the United States provide them with access to their families and to legal counsel. On information and belief, the detained petitioners were kept blindfolded, and sedated against their will for lengthy periods while they were taken involuntarily to Guantanamo Bay. On information and belief, in the course of being taken to Guantanamo Bay, the detained petitioners were transported via other American territory. On information and belief, the detained petitioners have been forced to provide involuntary statements to Respondents' agents in Guantanamo Bay.

33. On information and belief, the detained petitioners have been held under conditions that violate their international and constitutional rights to dignity and freedom from cruel, unusual and degrading punishment. They have not been provided with housing that even has proper walls. They have been forced to use a bucket for a toilet, and have not been provided with basic hygienic facilities. They have not been provided with meaningful access to their families. They have not been provided with the opportunity fully to exercise their religious beliefs. They have been exposed to the indignity and humiliation of the cameras of the national and international press, brought to Guantanamo Bay with the express consent and control of Respondents. Anyone who has seen them has been under instructions not to tell them even where they are being held.

The Detention Order

34. On November 13, 2001, respondent Bush issued a Military Order authorizing indefinite detention without due process of law. The Order authorizes respondent Rumsfeld to detain anyone respondent Bush has "reason to believe":

> i. is or was a member of the organization known as al Qaida;
>
> ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> iii. has knowingly harbored one or more individuals described in subparagraphs (i) and (ii)

See Exhibit K, Military Order of November 13, 2001. President Bush must make this determination in writing. The Order was neither authorized nor directed by Congress, and is beyond the scope of the Joint Resolution of September 18, 2001.

35. The Military Order vests the President with complete discretion to identify the individuals that fall within its scope. It establishes no standards governing the use of his discretion. Once a person has been detained, the Order contains no provision for him to be notified of the charges he may face. On the contrary, the Order authorizes detainees to be held without charges. It contains no provision for detainees to be notified of their rights under domestic and international law, and provides neither the

to counsel, nor the right to consular access. It provides no right to appear before a neutral tribunal to review the legality of a detainee's continued detention, and no provision for appeal to an Article III court. In fact, the Order expressly bars review by any court. Though the Order directs respondent Rumsfeld to create military tribunals, it sets no deadline for his task. And for those detainees who will not be tried before a tribunal, the Order authorizes indefinite and unreviewable detention, based on nothing more than the President's written determination that an individual is subject to its terms.

36. The Military Order was promulgated in the United States and in this judicial district, the decision to detain petitioners was made by respondents in the United States and in this judicial district, the decision to detain petitioners on Guantanamo Bay was made in the United States and in this judicial district, and the decision to continue detaining petitioners was, and is, being made by respondents in the United States and in this judicial district.

37. The United States Government has advised the Australian Government that Mr. Hicks is being held at Camp X-Ray, Guantanamo Bay Naval Station, Guantanamo Bay, Cuba, pursuant to this Order. *See* Exhibit L, Letter from Robert Cornall, Australian Attorney General's Department, to Stephen Kenny, Australian counsel for Petitioners (Jan. 18, 2002).

38. British Foreign Office Minister Ben Bradshaw advised Parliament on January 21, 2002, that British officials had visited three British citizens being detained at Camp X-Ray, Guantanamo Bay Naval Station, Guantanamo Bay, Cuba, who were held pursuant to this Order.

Only one of the detainees was named; the name given was neither Mr. Iqbal nor Mr. Rasul. However, Petitioners Mohammed Iqbal and Skina Bibi received telephone calls from the Foreign and Commonwealth Office January 21, 2002, during which they were informed that their sons were being detained at Camp X-Ray, in Guantanamo Bay.

39. On information and belief, respondent Bush has never certified or determined in any manner, in writing or otherwise, that the detained petitioners are subject to this detention order.

40. The detained petitioners are not properly subject to this detention order.

Guantanamo Bay Naval Station

41. On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray, at the United States Naval Base, in Guantanamo Bay, Cuba. Guantanamo Bay is a self-sufficient and essentially permanent city with approximately 7,000 military and civilian residents under the complete jurisdiction and control of the United States. Guantanamo Bay occupies nearly thirty-one square miles of land, an area larger than Manhattan, and nearly half the size of the District of Columbia. It has its own schools, generates its own power, provides its own internal transportation, and supplies its own water. Offenses committed by both civilians and foreign nationals living on Guantanamo are brought before federal courts on the mainland, where defendants enjoy the full panoply of Constitutional rights.

42. The United States has occupied Guantanamo Bay since 1903, and has repeatedly declared its intention to remain there indefinitely. For several decades, the United States has resisted claims of national sovereignty made by Cuba over Guantanamo Bay, insisting that its occupation of the land is legal and will remain so in perpetuity, so long as the United States chooses to exercise dominion and control over the land. The area is now, and has been for many years, under exclusive United States jurisdiction.

43. Guantanamo Bay has developed into a fully American enclave with all the residential, commercial, and recreational trappings of a small American city. The infrastructure is permanent and complex, providing for a wholly self-sufficient American community. The "Gitmo Guide", available online, lists fifteen restaurants, a bowling alley, and a Baskin Robbins. *See* The Gitmo Guide, at http://www.geocities.com/Pentagon/6625/dining.html. Guantanamo Bay contains an outdoor movie theater, a McDonald's and a mini-mall. http://www.cubanet.org/CNews/y02/jan02/15e5.htm. Residents, as well as their children, enjoy a number of recreational activities and clubs, including the Boys Scouts, Cub Scouts, USA Girl Scouts, the Guantanamo Bay Little Theater Company, an Archery Club, a golf club and even a Star Trek club. Residents may participate in a number of different sports including golf, hunting, tennis, horseback riding, football, softball and soccer.

44. A small children's zoo has been established on the naval base which contains "goats, donkeys, iguanas and banana rats. To facilitate water recreation for the residents, the bay side beaches have been dredged and pooled to protect bathers from the undertow and swift

tidal current in the bay. "Gitmo boasts its own yatch club, which conducts races nearly every week . . . [requiring] all boats . . . to fly the United States flag."[1] The United States has established 'America's Slice of Cuba,'[2] where the residents "live in American-style homes, shop for American products and drive American cars. They have cable TV and radio stations, and their children attend schools that could be found in any suburban neighborhood."[3]

45. In light of the foregoing, the United States Navy has accurately described Guantanamo Bay as "a Naval reservation *which, for all practical purposes, is American territory.* Under the [lease] agreements, *the United States has for approximately [ninety] years exercised the essential elements of sovereignty over this territory,* without actually owning it. Unless we abandon the area or agree to a modification of the terms of our occupancy, we can continue in the present status as long as we like, [According to the United States p]ersons on the reservation are amenable only to United States legislative enactments." *See* The History of Guantanamo Bay: An Online Edition (1964), available at http://www.nsgtmo.navy.mil/history.htm.

46. On or about January 11, 2002, the precise date unknown to counsel but known to respondents, the United

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[1] Theodore K Mason, "Across the Cactus Curtain" at 106 (1984) (Library of Congress Cataloging in Publication Data).

[2] *See* Tom Gibbs, "World Americas, America's Slice of Cuba" (BBC Online Network, Friday January 1, 1999).

[3] http://www.sun-sentinel.com/news/local/cuba/sns-gitmo-galleryindex.photogallery?coll=sfla-news-cuba-(inside Guantanamo Bay Naval Station).

States military transferred the detained petitioners to Camp X-Ray, Guantanamo Bay, where they have been held ever since, in the custody of respondents Bush, Rumsfeld, Lehnert, and Carrico.

47. Since gaining control of the detained petitioners, the United States military has held them virtually *incommunicado*. They have been or will be interrogated repeatedly by agents of the United States Departments of Defense and Justice, though they have not been charged with an offense, nor have they been notified of any pending or contemplated charges. They have made no appearance before either a military or civilian tribunal of any sort, nor have they been provided counsel or the means to contact counsel. They have not been informed of their rights under the United States Constitution, the regulations of the United States Military, the Geneva Convention, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, or Customary International Law. Indeed, the respondents have taken the position that the detainees should not be told of these rights. As a result, the detained petitioners are completely unable either to protect, or to vindicate their rights under domestic and international law.

48. David Hicks has been allowed to write a single, brief letter to his father, which was delivered by the Australian Red Cross. In that letter, he asked his father for legal assistance. *See* Exhibit B, Affidavit of Terry Hicks.

49. Shafiq Rasul has attempted to pass messages to his family, through the Red Cross. The U.S. authorities did not permit the details of these messages to be delivered. A

summary was provided, however, indicating that Mr. Rasul was well and that he had asked for legal representation. *See* Exhibit H, Affidavit of Skina Bibi. Asif Iqbal communicated with his family, through the Red Cross, when he was detained in Afghanistan. It is unknown whether he has attempted to communicate with his family since his detention in Guantanamo.

50. In published statements, respondents Bush, Rumsfeld, Lehnert and Carrico have indicated the United States may hold the detained petitioners under these conditions indefinitely. *See, e.g.,* Roland Watson, *The Times (London),* Jan. 18, 2002 ("Donald Rumsfeld, the U.S. Defence Secretary, suggested last night that al-Qaeda prisoners could be held indefinitely at the base. He said that the detention of some would be open-ended as the United States tried to build a case against them."); Lynne Sladky, Associated Press, Jan. 22, 2002 ("Marine Brig. Gen. Mike Lehnert, who is in charge of the detention mission, defended the temporary cells where detainees are being held . . . 'We have to look at Camp X-ray as a work in progress. . . ,' Lehnert told CNN. . . . Lehnert said plans are to build a more permanent prison 'exactly in accordance with federal prison standards' "); John Mintz, THE WASHINGTON POST, "Extended Detention In Cuba Mulled," Feb. 13, 2002 ("As the Bush administration nears completion of new rules for conducting military trials of foreign detainees, U.S. officials say they envision the naval

base at Gantanamo Bay, Cuba, as a site for the tribunals and as a terrorist penal colony for many years to come.")[4]

V.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF (DUE PROCESS – FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION)

51. Petitioners incorporate paragraphs 1-50 by reference.

52. By the actions described above, respondents, acting under color of law, have violated and continue to violate the Fifth and Fourteenth Amendments to the United States Constitution. Respondent Bush has ordered the prolonged, indefinite, and arbitrary detention of individuals, without Due Process of Law. Respondents Rumsfeld, Lehnert, and Carrico are likewise acting in violation of the Fifth Amendment, since they act at the President's direction. On its face, the Executive Order violates the Fifth and Fourteenth Amendments.

[4] *See also* Time Magazine, "Welcome to Camp X-Ray" (February 3, 2002):

> "More curious still is the matter of the prisoners' ultimate fate. Rumsfeld has laid out four options: a military trial, a trial in U.S. criminal courts, return to their home countries for prosecution, or continued detention 'while additional intelligence is gathered.' The last seems a distinct possibility; the Pentagon plans to build 2,000 cells at Camp X-Ray."

SECOND CLAIM FOR RELIEF (DUE PROCESS – FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION)

53. Petitioners incorporate paragraphs 1-52 by reference.

54. By the actions described above, respondents, acting under color of law, have violated and continue to violate the right of the detained petitioners to be free from arbitrary, prolonged, and indefinite detention, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. The Executive Order, as applied to Mr. Hicks, Mr. Iqbal, and Mr. Rasul, violates the Fifth and Fourteenth Amendments.

THIRD CLAIM FOR RELIEF (DUE PROCESS – INTERNATIONAL LAW)

55. Petitioners incorporate paragraphs 1-54 by reference.

56. By the actions described above, respondents, acting under color of law, have violated and continue to violate Customary International Law, Arts. 9 & 14 of the International Covenant on Civil and Political Rights, and Arts. 18, 25, & 26 of the American Declaration on the Rights and Duties of Man. Respondent Bush has ordered the prolonged, indefinite, and arbitrary detention of individuals, without legal process, in violation of binding obligations of the United States under International Law. Respondents Rumsfeld, Lehnert, and Carrico are likewise acting in violation of International Law, since they act at the President's direction. On its face, the Executive Order violates International Law.

FOURTH CLAIM FOR RELIEF (DUE PROCESS – INTERNATIONAL LAW)

57. Petitioners incorporate paragraphs 1-56 by reference.

58. By the actions described above, respondents, acting under color of law, have violated and continue to violate the right of the detained petitioners to be free from arbitrary, prolonged, and indefinite detention, in violation of Customary International Law, Arts. 9 & 14 of the International Covenant on Civil and Political Rights, and Arts. 18, 25, & 26 of the American Declaration on the Rights and Duties of Man. The Executive Order, as applied to the detained petitioners, violates these and other binding obligations of the United States under International Law.

FIFTH CLAIM FOR RELIEF (DUE PROCESS – FAILURE TO COMPLY WITH U. S. MILITARY REGULATIONS AND INTERNATIONAL HUMANITARIAN LAW)

59. Petitioners incorporate paragraphs 1-58 by reference.

60. By the actions described above, respondents, acting under color of law, have violated and continue to violate the rights accorded to persons seized by the United States Military in times of armed conflict, as established by, *inter alia,* the regulations of the United States Military, Articles 4 and 5 of Geneva Convention III, Geneva Convention IV, and Customary International Law.

SIXTH CLAIM FOR RELIEF (WAR POWERS CLAUSE)

61 Petitioners incorporate paragraphs 1-60 by reference.

62. By the actions described above, respondents, acting under color of law, have exceeded the constitutional authority of the Executive and have violated and continue to violate the War Powers Clause by ordering the prolonged and indefinite detention of the detained petitioners without Congressional authorization.

SEVENTH CLAIM FOR RELIEF (SUSPENSION OF THE WRIT)

63. Petitioners incorporate paragraphs 1-62 by reference.

64. To the extent the order of November 13, 2001, disallows any challenge to the legality of the detained petitioners' detention by way of habeas corpus, the Order and its enforcement constitute an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution.

VI.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

1. Grant Petitioner Terry Hicks Next Friend status, as Next Friend of David Hicks;

2. Grant Petitioner Mohammed Iqbal Next Friend status, as Next Friend of Asif Iqbal;

3. Grant Petitioner Skina Bibi Next Friend status, as Next Friend of Shafiq Rasul;

4. Order the detained petitioners released from respondents' unlawful custody;

5. Order respondents to allow counsel to meet and confer with the detained petitioners, in private and unmonitored attorney-client conversations;

6. Order respondents to cease all interrogations of the detained petitioners, direct or indirect, while this litigation is pending;

7. Order and declare the Executive Order of November 13, 2001, unlawful as a violation of the Fifth and Fourteenth Amendments to the United States Constitution;

8. Order and declare that the detained petitioners are being held in violation of the Fifth and Fourteenth Amendments to the United States Constitution;

9. Order and declare the Executive Order of November 13, 2001, unlawful as a violation of Customary International Law, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man;

10. Order and declare that the detained petitioners are being held in violation of Customary International Law, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man;

11. Order and declare that the detained petitioners are being held in violation of the regulations of the United States Military, the Geneva Convention, and International Humanitarian Law;

12. Order and declare that the Executive Order of November 13, 2001, violates the War Powers Clause;

13. Order and declare that the provision of the Executive Order that bars the detained petitioners from seeking relief in this Court is an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution;

14. To the extent respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations;

15. Such other relief as the Court may deem necessary and appropriate to protect Petitioners' rights under the United States Constitution and International Law.

Dated: 3-12-02

Respectfully submitted,

Counsel for Petitioners:

/s/ L. Barrett Boss (for)
Joseph Margulies*
Minnesota Bar No. 208528
MARGULIES & RICHMAN, plc
2520 Park Avenue, South
Minneapolis, MN 55404
612-872-4900
612-872-4967 (FAX)

/s/ L. Barrett Boss (for)
Clive A. Stafford Smith**
Louisiana Bar No. 14444
P.O. Box 50753
New Orleans, LA
70150-0753
(504) 558-0440

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* Mr. Margulies, Mr. Kenny, and the Center for Constitutional Rights appear for Petitioners Terry and David Hicks.

** Mr. Stafford Smith and Ms. Peirce appear for Petitioners Asif and Mohammed Iqbal, as well as Petitioners Rasul and Bibi.

Mr. Norris and Mr. Boss appear as local counsel for all attorneys.

/s/ L. Barrett Boss (for)
Michael Ratner*
William Goodman
Anthony DiCaprio
Center for Constitutional Rights
666 Broadway
New York, N.Y. 10012
(212) 614-6464
(212) 614-6499 (FAX)

/s/ L. Barrett Boss (for)
Gareth Peirce**
Birnberg, Peirce and Partners, Solicitors
14 Inverness Street
London NW1 7HJ
United Kingdom
0207-911-0166
0207-911-0170 (FAX)

/s/ L. Barrett Boss (for)
Stephen Kenny*
CAMATTA LEMPENS, PTY LTD.
BARRISTERS AND SOLICITORS
345 King William Street
Adelaide, SA 5000
(011) 618-8410-0211
(011) 618-8410-0566 (FAX)

/s/ L. Barrett Boss (for)
Jon W. Norris
D.C. Bar No. 426105
The Law Office of Jon W. Norris
641 Indiana Avenue, N.W.
Washington, D.C. 20002
(202) 546-1500
(202) 842-2622 (FAX)

/s/ L. Barrett Boss
L. Barrett Boss
Bar No. 398100
ASBILL MOFFITT & BOSS, Chtd.
1615 New Hampshire Avenue, NW
Suite 200
Washington, DC 20009
(202) 234 9000 (x119)
(202) 332 6480 (FAX)

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on this 12th day of March, 2002.

/s/ L. Barrett Boss
L. Barrett Boss

General Docket
US Court of Appeals for the DC Circuit

HABIB, et al v. BUSH, et al

9/11/02 CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Mamdouh Habib, and by Appellant Maha Habib. [701053-1] (jth) [02-5284]

* * *

9/12/02 MOTION filed (5 copies) by Appellants Mamdouh Habib, and Maha Habib (certificate of fax/mail service dated 9/12/02) to expedite [701779-1]. (jth) [02-5284]

9/12/02 MOTION filed (5 copies) by Appellants Mamdouh Habib, et al. in 02-5284, and Appellants Shafiq Rasul in 02-5288, et al., in 02-5288 (certificate of fax/mail service dated 9/12/02) to consolidate these cases [701789-1]. [02-5284, 02-5288] (jth) [02-5284, 02-5288]

9/13/02 PER CURIAM ORDER filed [701827-1] granting the motion to consolidate No. 02-5284 with No. 02-5288 [701789-1]. It is FURTHER ORDERRED [sic] that the motions to expedite [701779-1], [701783-1] be granted. FURTHER ORDERED, on the court's own motion, that consolidated Nos. 02-5284 and 02-5288 be consolidated with No. 02-5251 [701827-1]. FURTHER ORDERED that the following briefing format and schedule apply in all three consolidated cases [701827-3]: Joint Brief for Appellants Habib and Rasul (not to exceed 14,000 words) due on 9/24/02; Brief for Appellant Odah (not to exceed 14,000 words) due on 9/24/02; Joint Appendix due on 9/24/02; Appellees' Brief (not to exceed 14,000 words) due on 10/18/02; Joint Reply Brief for Appellants

Habib and Rasul (not to exceed 7,000 words) due on 10/29/02, Reply Brief for Appellant Odah (not to exceed 7,000 words) due on 10/29/02. Absent extraordinarily compelling circumstances, the court will not grant any modification of these provisions. The parties are directed to file and serve their briefs by hand. The oral argument date and composition of the mertis [sic] panel will be established by separate order. Before Judges: Edwards, Rogers and Tatel. [E

U.S. District Court

USDC District of Columbia (Washington)

CIVIL DOCKET FOR CASE #: 02-CV-1130

HABIB, et al v. BUSH, et al

DATE	#	DOCKET ENTRY
6/10/02	1	PETITION filed by petitioners MAMDOUH HABIB, and MAHA HABIB for writ of habeas corpus; attachments (4) (bm) [Entry date 06/13/02]
		* * *
6/10/02	2	NOTIFICATION OF RELATED CASE: Case related to Case No(s): CA 02-828 and CA 02-299 (bm) [Entry date 06/13/02]
7/30/02	3	ORDER by Judge Colleen Kollar-Kotelly: that Petitioners shall have unitl 8/7/02 to show cause why the Petition of Writ of Habeas Corpus should not be dismissed with prejudice. If the Court does not receive a response from Petitioners by 8/7/02, it will dismiss the Petition for Writ of Habeas Corpus with prejudice. (N) (dot) [Entry date 7/31/02]
8/6/02	4	RESPONSE by petitioner MAMDOUH HABIB, petitioner MAHA HABIB to order shall have unitl [sic] 8/7/02 to show cause why the Petition for Writ of Habeas Corpus should not be dismissed with prejudice. [3-1] (aet) [Entry date 08/08/02]
8/8/02	5	MEMORANDUM OPINION by Judge Colleen Kollar-Kotelly dismissing this case. (N) (jwd)

8/8/02	6	ORDER by Judge Colleen Kollar-Kotelly: dismissing petition for Writ of Habeas Corpus with prejudice for the reasons set forth in the Court's July 30, 2002, Memorandum Opinion filed in Rasul v. Bush, C.A. 02-0299, and Odah v. United States, C.A. 02-828. (N) (N) (jwd)
9/9/02	7	NOTICE OF APPEAL by petitioner MAMDOUH HABIB, petitioner MAHA HABIB from order [6-1], entered on: 8/8/02. Filing fee of $100, docketing fee of $5 paid. Copies sent. (aet) [Entry date 09/10/02]
		* * *
9/11/02	–	USCA # 02-5284 assigned for appeal [7-1] by MAHA HABIB, MAMDOUH HABIB (aet) [Entry date 09/12/02]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mamdouh Habib, Detainee, Camp Delta Guantanamo Bay Naval Base Guantanamo Bay, Cuba	)	
Maha Habib, as Next Friend of Mamdouh Habib	)	PETITION
Petitioners,	)	FOR WRIT
v.	)	OF HABEAS
GEORGE WALKER BUSH, President of the United States The White House 1600 Pennsylvania Ave., N.W. Washington, D.C. 20500	)	CORPUS AND REQUEST FOR ADEQUATE PROCESS No.
DONALD RUMSFELD, Secretary, United States Department of Defense 1000 Defense Pentagon Washington, D.C. 20301-1000	)	
BRIGADIER GENERAL RICK BACCUS, Commanding General, Joint Task Force-160 Guantanamo Bay Naval Base Guantanamo Bay, Cuba	)	
LIEUTENANT COLONEL WILLIAM CLINE, Commander, Camp Delta, Guantanamo Bay Naval Base Guantanamo Bay, Cuba	)	
Respondents All sued in their official and individual capacities.	)	

PETITION FOR WRIT OF HABEAS CORPUS

1. Petitioner Mamdouh Habib seeks the Great Writ. He acts on his own behalf and through his Next Friend, his wife, Maha Habib. Mr. Habib is a citizen of Australia. In this action, he seeks a process by which this Court can determine whether his detention is lawful, and a declaration that without such process, he is being held unlawfully.

I
JURISDICTION

2. Petitioners bring this action under 28 U.S.C. §§2241 and 2242, 28 U.S.C. §§1331, 1350, 1651, 2201, and 2202; 5 U.S.C. §702; as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the International Covenant on Civil and Political Rights ("ICCPR"), the American Declaration on the Rights and Duties of Man ("ADRDM"), and Customary International Law. These statutes, constitutional provisions, and international legal obligations of the United States vest this Court with jurisdiction to hear the action. In addition, because they seek declaratory relief, Petitioners also rely on F. R. Civ. P. 57.

3. This Court is empowered under 28 U.S.C. §2241 to grant the Writ of Habeas Corpus, and to entertain the Petition filed by Maha Habib as Next Friend under 28 U.S.C. §2242. The Court is also empowered under 28 U.S.C. §1350, the Alien Tort Claims Act, to hear the action, as Petitioner is a foreign national arbitrarily detained in violation of customary international law. This Court is further empowered to declare the rights and other legal relations of the parties herein by 28 U.S.C. §2201, and to effectuate and enforce declaratory relief by all necessary and proper means by 28

U.S.C. §2202, as this case involves an actual controversy within the Court's jurisdiction.

II
VENUE

4 [sic]. Venue is proper in the United States District Court for the District of Columbia, since at least one respondent resides in the district, a substantial part of the events or omissions giving rise to the claim occurred in the district, at least one respondent may be found in the district, and all respondents are either officers or employees of the United States or any agency thereof acting in their official capacities. 28 U.S.C. §§1391(b); 1391(e).

III
PARTIES

4 [sic]. Petitioner Mamdouh Habib is an Australian citizen presently incarcerated and held in respondents' unlawful custody at Camp Delta, United States Naval Base, Guantanamo Bay, Cuba. *See* Exhibit A, Affidavit of Maha Habib, attachment "MH2".

5. Petitioner Maha Habib is Mamdouh Habib's wife. She too is an Australian citizen. Maha Habib has received correspondence from her husband; delivered through the Australian Red Cross, asking her for legal assistance. Because her husband cannot secure access either to legal counsel or the courts of the United States, Maha Habib acts as Next Friend. *See Id,* attachment "MH8".

6. Through counsel, Maha Habib has tried repeatedly to contact her husband, to learn more about his condition and status and to gain access to him. The United States has either rebuffed or ignored counsel's requests.

7. On the 26 April 2002, counsel wrote to the United States Ambassador to Australia to ask, among other things, that he be afforded access to his client and that the Embassy facilitate correspondence between his client and his family. In this letter, counsel also asked the United States to confirm the legal basis for his client's detention and whether he had been charged with any offence. *See* Exhibit B, Affidavit of Stephen Hopper, Australian Counsel for petitioners, attachment "SH7".

8. On the 17 May, 2002, counsel sent a letter in similar terms to respondent Bush. *See Id.* attachment "SH10".

9. To date, no reply has been received from either the United States Ambassador or from respondent Bush.

10. In the week commencing 13 May 2002, officials from the Australian government visited Mr. Habib at Camp Delta. Upon their return, the Australian government issued a press release in which they confirmed that Mr. Habib was detained at Guantanamo Bay. *See Id.* attachment "SH12". During their visit the Australian government did not determine the legal authority for Mr. Habib's detention. Nor did they arrange for his counsel to have access to him. They did, however, deliver to Mrs. Habib a letter written by her husband in which he denied any wrongdoing or involvement in terrorist activity. In this letter, he made clear his wish for his wife to secure legal representation for him. *See Id.*, attachment "MH9".

11. Respondent Bush is the President of the United States and Commander in Chief of the United States Military. It is pursuant to the Military Order promulgated by him or alternatively, under his authority as

Commander in Chief and under the laws and usages of war that Mr. Habib is being detained. He is sued in his official and personal capacities.

12. Respondent Rumsfeld is the Secretary of the United States Department of Defense. Either pursuant to the Military Order or the President's authority as Commander in Chief and under the laws and usages of war, respondent Rumsfeld has been charged with maintaining the custody and control of the detained petitioner. Respondent Rumsfeld is sued in his official and personal capacities.

13. Respondent Baccus is the Commanding General of Joint Task Force-160, the task force running the detention operation at the Guantanamo Naval Station, Guantanamo Bay, Cuba. He has supervisory responsibility for the detained petitioner and is sued in his official and personal capacities.

14. Respondent Cline is the Commander of Camp Delta, where the detained petitioner is presently held. He is the immediate custodian responsible for his detention, and is sued in his official and personal capacities.

IV
STATEMENT OF FACTS

15. The detained petitioner is not, and has never been an enemy alien, combatant or unlawful combatant. Mamdouh Habib is an Australian citizen and civilian in respondents' unlawful custody.

16. In August 2001, Mr. Habib traveled to Pakistan from Australia to look for employment and for a school for his two teenage children. On information and belief, on 5 October, 2002, shortly before he was due to return to his family in Australia, Mr. Habib was

arrested and detained by Pakistani authorities in Pakistan. He was initially held by Pakistani authorities at a detention facility in the city of Quetta before being transferred to another such facility in Islamabad. While in Pakistan, he was detained virtually incommunicado for approximately 11 days. *See* Exhibit B at pp. 3-4.

17. On an unknown date in October, and for reasons unknown, Mr. Habib was transported from Pakistan to Egypt where he was detained by Egyptian authorities. *See.* Exhibit A, attachment "MH5".

18. On 18 April, 2002, the Australian government notified Mrs. Habib that her husband had been handed over by the Egyptian authorities to the custody and control of the United States' military and from Egypt transported by them to Afghanistan. *See* Exhibit A, attachment "MH6". This was the first occasion on which the Mr. Habib had been to Afghanistan.

19. On 6 May 2002, the Australian government issued a press release stating that the United States had transferred Mr. Habib to its detention facility at Guantanamo Bay, Cuba, on 4 May, 2002. *See* Exhibit B, attachment "SH9".

Petitioner's Seizure By The United States

20. In the wake of September 11 2001, the United States, at the direction of respondent Bush, began a massive military campaign against the Taliban regime then in power in Afghanistan. On September 18, 2001, a Joint Resolution of Congress authorized the President to use force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons." Joint Resolution 23, Authorization for Use of Military Force,

Public Law 107-40, 115 Stat. 224 (Jan. 18, 2001). The Resolution did not authorize the indefinite detention of persons seized on the field of battle, nor does it authorize the indefinite detention of innocent men.

21. On 7 October 2001, the United States launched an aerial bombing campaign which targeted specific Al Qaida and Taliban government military installations within the territory of Afghanistan. This date marked the first day of armed conflict between the United States and its coalition partners and the Taliban government and Al Qaida armed forces. Mr. Habib's initial apprehension by Pakistani authorities in Pakistan on 5 October 2001 took place before the commencement of the armed conflict and well before any American personnel were engaged in fighting. Prior to, at the time of, and throughout his subsequent detention, Mr. Habib was neither a member of the Taliban government nor Al Qaida armed forces, nor had he caused or attempted to cause any harm to American personnel or property prior to his detention.

22. On an unknown date in October 2001, Mr. Habib was flown to Egypt where he was detained by Egyptian authorities. On a date unknown to counsel but known to respondents, the Egyptian authorities released Mr. Habib into the custody of the United States' military. *See* Exhibit A, attachment "MH6". Mr. Habib has been held in United States custody since that time.

23. The detained petitioner is not, and has never been, a member of Al Qaida or any other terrorist group. Prior to his detention, he did not commit any violent act against any American person, nor espouse any violent act against any American person or property, nor was he involved in the ensuing armed conflict. Mr. Habib was at all relevant times a non-combatant civilian. On information and belief, he had no involvement, direct or indirect, in either the terrorist

attacks on the United States September 11 2001, or any act of international terrorism attributed by the United States to Al Qaida or any terrorist group. He is not properly subject to the detention Order issued by respondent Bush. As he did not participate in the armed conflict at any point in time, nor is he properly subject to respondent Bush's authority as Commander in Chief and under the laws and usages of war.

24. On information and belief, the detained petitioner has had no military or terrorist training. On information and belief, he at no time joined any terrorist force.

25. On information and belief, the detained petitioner was not initially taken into custody by American forces. He was taken into custody against his will by Pakistani and Egyptian authorities and handed over to the Americans. He has not engaged in combat against American forces.

26. On information and belief, the detained petitioner promptly identified himself by correct name and nationality to the United States. He requested that the United States provide him with access to his family and to legal counsel. On information and belief, the detained petitioner was kept blindfolded against his will for lengthy periods while being taken involuntarily to Guantanamo Bay. On information and belief, in the course of being taken to Guantanamo Bay, the detained petitioner was transported via other American territory. On information and belief, the detained petitioner has been forced to provide involuntary statements to respondents' agents in Guantanamo Bay.

27. On information and belief, the detained petitioner has been held under conditions that violate his international and constitutional rights to dignity and freedom from cruel, unusual and degrading punishment. He has been housed throughout his detention in

accommodation that fails to satisfy both domestic and internationally accepted standards of accommodation for any person subject to detention. He has been refused meaningful access to his family. He has not been provided with the opportunity fully to exercise his religious beliefs.

The Detention Order

28. On November 13, 2001, respondent Bush issued a Military Order authorizing indefinite detention without due process of law. The Order authorizes respondent Rumsfeld to detain anyone respondent Bush has "reason to believe":

    i. is or was a member of the organization known as al Qaida;

    ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

    iii. has knowingly harbored one or more individuals described in subparagraphs (i) and (ii)

    See Exhibit C, Military Order of November 13, 2001. President Bush must make this determination in writing. The Order was neither authorized nor directed by Congress, and is beyond the scope of the Joint Resolution of September 18, 2001.

29. The Military Order vests the President with complete discretion to identify the individuals that fall within its scope. It establishes no standards governing the

use of his discretion. Once a person has been detained, the Order contains no provision for him to be notified of the charges he may face. On the contrary, the Order authorizes detainees to be held without charges. It contains no provision for detainees to be notified of their rights under domestic and international law, and provides neither the right to counsel, nor the right to consular access. It provides no right to appear before a neutral tribunal to review the legality of a detainee's continued detention and no provision for appeal to an Article III court. In fact, the Order expressly bars review by any court. For those detainees who will not be tried before a tribunal, the Order authorizes indefinite and unreviewable detention, based on nothing more than the President's written determination that an individual is subject to its terms.

30. The Military Order was promulgated in the United States and in this judicial district, the decision to detain Mr. Habib was made by respondents in the United States and in this judicial district, the decision to detain the Mr. Habib at Guantanamo Bay was made in the United States and in this judicial district, and the decision to continue detaining the petitioner was, and is, being made by respondents in the United States and in this judicial district.

31. On information and belief, respondent Bush has never certified or determined in any manner in writing or otherwise, that the detained petitioner is subject to this detention order.

32. The detained petitioner is not properly subject to this detention order.

33. In the related case of *Rasul v. Bush*, No. 02-CV-0299 (CKK), filed Feb. 19, 2002, respondents contend that the petitioners in that case are being detained not

pursuant to the President's Military Order but rather under the President's authority as Commander in Chief and under the laws and usages of war. *See* Exhibit D, Respondent's Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus, pp. 8-9.

34. Mr. Habib was not arrested or detained by the United States in the course of the armed conflict. He was detained by Pakistani, not United States authorities on 5 October, 2001, before hostilities began.

35. Mr. Habib was arrested by Pakistani authorities not in Afghanistan, but Pakistan, nowhere near the battlefield.

36. Mr. Habib was handed over to United States' custody by Egyptian authorities in Egypt.

37. The detained petitioner is not properly detained under the President's authority as Commander in Chief and under the laws and usages of war.

Guantanamo Bay Naval Station

38. On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp Delta, at the United States Naval Base, in Guantanamo Bay, Cuba. Guantanamo Bay is a self-sufficient and essentially permanent city with approximately 7,000 military and civilian residents under the complete jurisdiction and control of the United States. Guantanamo Bay occupies nearly thirty-one square miles of land, an area larger than Manhattan, and nearly half the size of the District of Columbia. It has its own schools, generates its own power, provides its own internal transportation, and supplies its own water. Offenses committed by both civilians and foreign nationals living on Guantanamo

are brought before federal courts on the mainland, where defendants enjoy the full panoply of Constitutional rights.

39. The United States has occupied Guantanamo Bay since 1903, and has repeatedly declared its intention to remain there indefinitely. For several decades, the United States has resisted claims of national sovereignty made by Cuba over Guantanamo Bay, insisting that its occupation of the land is legal and will remain so in perpetuity, so long as the United States chooses to exercise dominion and control over the land. The area is now, and has been for many years, under exclusive United States jurisdiction.

40. Guantanamo Bay has developed into a fully American enclave with all the residential, commercial, and recreational trappings of a small American city. The infrastructure is permanent and complex, providing for a wholly self-sufficient American community. The "Gitmo Guide", available online, lists fifteen restaurants, a bowling alley, and a Baskin Robbins. *See* The Gitmo Guide, at http://www.geocities.com/Pentagon/6625/dining.html. Guantanamo Bay contains an outdoor movie theater, a McDonald's and a mini-mall. http://www.cubanet.org/CNews/y02/jan02/15e5.htm. Residents, as well as their children, enjoy a number of recreational activities and clubs, including the Boys Scouts, Cub Scouts, USA Girl Scouts, the Guantanamo Bay Little Theater Company, an Archery Club, a golf club and even a Star Trek club. Residents may participate in a number of different sports including golf, hunting, tennis, horseback riding, football, softball and soccer.

41. A small children's, zoo has been established on the naval base which contains "goats, donkeys, iguanas and banana rats. To facilitate water recreation for the residents, the bay side beaches have been dredged

and pooled to protect bathers from the undertow and swift tidal current in the bay. "Gitmo boasts its own yacht club, which conducts races nearly every week . . . [requiring] all boats . . . to fly the United States flag"[1] The United States has established 'America's Slice of Cuba,"[2] where the residents "live in American-style homes, shop for American products and drive American cars. They have cable TV and radio stations, and their children attend schools that could be found in any suburban neighborhood."[3]

42. In light of the foregoing, the United States Navy has accurately described Guantanamo Bay as "a Naval reservation *which, for all practical purposes, is American territory*. Under the [lease] agreements, *the United States has for approximately [ninety] years exercised the essential elements of sovereignty over this territory*, without actually owning it. Unless we abandon the area or agree to a modification of the terms of our occupancy, we can continue in the present status as long as we like. [According to the United States [p]ersons on the reservation are amenable only to United States legislative enactments." *See* The History of Guantanamo Bay: An Online Edition (1964), available at http://www.nsgtmo.navy.mil/history.htm.

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[1] Theodore K Mason, "Across the Cactus Curtain" at 106 (1984) (Library of Congress Cataloging in Publication Data).

[2] *See* Tom Gibbs, "World Americas, America's Slice of Cuba" (BBC Online Network, Friday January 1, 1999).

[3] http://www.sun-sentinel.com/news/local/cuba/sns-gitmo-galleryindex.photogallery?coll=sfla-news-cuba-(Inside Guantanamo Bay Naval Station).

The Petitioner's Detention at Guantanamo

43. On May 4, 2002, the United States military transferred the detained petitioner to Camp Delta, Guantanamo Bay, where he has been held ever since, in the custody of respondents Bush, Rumsfeld, Baccus, and Cline.

44. Since gaining control of the detained petitioner, the United States military has held him virtually *incommunicado*. He has been or will be interrogated repeatedly by agents of the United States Departments of Defense and Justice, though he has not been charged with an offense, nor has he been notified of any pending or contemplated charges. He has made no appearance before either a military or civilian tribunal of any sort, nor has he been provided counsel or the means to contact counsel. He has not been informed of his rights under the United States Constitution, the regulations of the United States Military, the Geneva Conventions, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, or Customary International Law. Indeed, the respondents have taken the position that he should not be told of these rights. As a result, the detained petitioner is completely unable either to protect, or to vindicate his rights under domestic and international law.

45. Mr. Habib has only been permitted to write a total of three letters to his wife and family since his detention, two of which were delivered to them by the Australian Red Cross one month after they were written, the third was delivered to them by the Australian government. In these letters, detained petitioner expressly requested that his wife seek legal assistance on his behalf. *See* Exhibit A, attachments "MH8" and "MH9".

46. In published statements, respondent Bush and Rumsfeld, and individuals who held the position of respondents Baccus and Cline, Commanding General Lehnert and Camp Commander, Carrico, have indicated that the United States may hold the detained petitioner under these conditions indefinitely. *See, e.g.,* Roland Watson, *The Times (London)*, Jan. 18, 2002 ("Donald Rumsfeld, the U.S. Defence Secretary, suggested last night that al-Qaeda prisoners could be held indefinitely at the base. He said that the detention of some would be open-ended as the United States tried to build a case against them."); Lynne Sladky, Associated Press, Jan. 22, 2002 ("Marine Brig. Gen. Mike Lehnert, who is in charge of the detention mission, defended the temporary cells where detainees are being held . . . 'We have to look at Camp X-ray as a work in progress . . . ,' Lehnert told CNN. . . . Lehnert said plans are to build a more permanent prison 'exactly in accordance with federal prison standards' "); John Mintz, THE WASHINGTON POST, "Extended Detention In Cuba Mulled," Feb. 13, 2002 ("As the Bush administration nears completion of new rules for conducting military trials of foreign detainees, U.S. officials say they envision the naval base at Gantanamo Bay, Cuba, as a site for the tribunals and as a terrorist penal colony for many years to come.").[4] Yet at the same time, respondents and those

[4] *See also* Time Magazine, "Welcome to Camp X-Ray" (February 3, 2002):

> "More curious still is the matter of the prisoners' ultimate fate. Rumsfeld has laid out four options: a military trial, a trial in U.S. criminal courts, return to their home countries for prosecution, or continued detention 'while additional intelligence is gathered.' The last seems a distinct possibility; the Pentagon plans to build 2,000 cells at Camp X-Ray."

in their chain of command have acknowledged that at least "some [of the detainees] were 'victims of circumstance' and probably innocent." Katharine Q. Seelye, *A Nation Challenged*: *Capitves*, N.Y. Times, March 16, 2002; *see also* United States Department of Defense News Transcript, Rumsfeld Interview with KTSP-ABC, St. Paul, Minnesota, February 27, 2002 at 2 (acknowledging the prospect that some detainees are innocent and arrested improperly.)

47. Mr. Habib is among the detainees who is entirely innocent of any wrongdoing.

V
CAUSES OF ACTION

FIRST CLAIM FOR RELIEF
(DUE PROCESS – FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION)

48. Petitioners incorporate paragraphs 1-47 by reference.

49. By the actions described above, respondents, acting under color of law, have violated and continue to violate the Fifth Amendment to the United States Constitution. Respondent Bush, acting pursuant to the Military Order or his authority as Commander in Chief or under the laws and usages of war, has ordered the prolonged, indefinite, and arbitrary detention of individuals, without Due Process of Law. Respondents Rumsfeld, Baccus, and Cline are likewise acting in violation of the Fifth Amendment, since they act at the President's direction. On its face, the Military Order violates the Fifth and Fourteenth Amendments.

SECOND CLAIM FOR RELIEF
(DUE PROCESS – FIFTH AMENDMENT
TO THE UNITED STATES CONSTITUTION)

50. Petitioners incorporate paragraphs 1-49 by reference.

51. By the actions described above, respondents, acting under color of law, have violated and continue to violate the right of the detained petitioner to be free from arbitrary, prolonged, and indefinite detention, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. To the extent Mr. Habib is held pursuant to the Military Order, that Order, as applied, violates the Due Process Clause of the Fifth Amendment. To the extent Mr. Habib is held pursuant to the President's authority as Commander in Chief or under the laws and usages of war, his detention violates the Due Process Clause of the Fifth Amendment.

THIRD CLAIM FOR RELIEF
(DUE PROCESS – INTERNATIONAL LAW)

52. Petitioners incorporate paragraphs 1-51 by reference.

53. By the actions described above, respondents, acting under color of law, have violated and continue to violate Customary International Law, Arts. 9 & 14 of the International Covenant on Civil and Political Rights, and Arts. 18, 25, & 26 of the American Declaration on the Rights and Duties of Man. Respondent Bush, acting pursuant to either the Military Order, his authority as Commander in Chief or under the laws and usages of war, has ordered the prolonged, indefinite, and arbitrary detention of Mr. Habib, without legal process, in violation of binding obligations of the United States under International Law. Respondents Rumsfeld, Baccus, and Cline are likewise acting in violation of International Law, since they act at the

President's direction. On its face, the Military Order violates International Law.

FOURTH CLAIM FOR RELIEF
(DUE PROCESS – INTERNATIONAL LAW)

54. Petitioners incorporate paragraphs 1-53 by reference.

55. By the actions described above, respondents, acting under color of law, have violated and continue to violate the right of the detained petitioner to be free from arbitrary, prolonged, and indefinite detention, in violation of Customary International Law, Arts. 9 & 14 of the International Covenant on Civil and Political Rights, and Arts. 18, 25, & 26 of the American Declaration on the Rights and Duties of Man. To the extent Mr. Habib is held pursuant to the Military Order, that order, as applied, violates these binding obligations of the United States under International Law. To the extent Mr. Habib is held pursuant to the President's authority as Commander in Chief or under the laws and usages of war, his detention violates these same obligations.

FIFTH CLAIM FOR RELIEF
(DUE PROCESS – FAILURE TO COMPLY
WITH U.S. MILITARY REGULATIONS AND
INTERNATIONAL HUMANITARIAN LAW)

56. Petitioners incorporate paragraphs 1-55 by reference.

57. By the actions described above, respondents, acting under color of law, have violated and continue to violate the rights accorded to persons seized by the United States Military in times of armed conflict, as established by, *inter alia,* the regulations of the United States Military, Articles 4 and 5 of Geneva

Convention III, Geneva Convention IV, and Customary International Law.

SIXTH CLAIM FOR RELIEF
(WAR POWERS CLAUSE)

58. Petitioners incorporate paragraphs 1-57 by reference.

59. By the actions described above, respondents, acting under color of law, have exceeded the constitutional authority of the Executive and have violated and continue to violate the War Powers Clause by ordering the prolonged and indefinite detention of the detained petitioner without Congressional authorization.

SEVENTH CLAIM FOR RELIEF
(SUSPENSION OF THE WRIT)

60. Petitioners incorporate paragraphs 1-59 by reference.

61. To the extent the order of November 13, 2001, disallows any challenge to the legality of the detained petitioner's detention by way of habeas corpus, the Order and its enforcement constitute an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution.

V
PRAYER FOR RELIEF

WHEREFORE, petitioners pray for relief as follows:

1. Grant petitioner Maha Habib Next Friend status, as Next Friend of Mamdouh Habib;

2. Order the detained petitioner released from respondents' unlawful custody, unless respondents commence a legally sufficient process adequate to establish the legality of petitioner's continued detention;

3. Order respondents to allow counsel to meet and confer with the detained petitioner, in private and unmonitored attorney-client conversations;

4. Order respondents to cease all interrogations of the detained petitioner, direct or indirect, while this litigation is pending;

5. Order and declare the Military Order of November 13, 2001, unlawful as a violation of the Fifth Amendment to the United States Constitution;

6. Order and declare that the detained petitioner is being held in violation of the Fifth and [sic] Amendment to the United States Constitution;

7. Order and declare the Military Order of November 13, 2001, unlawful as a violation of Customary International Law, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man;

8. Order and declare that the detained petitioner is being held in violation of Customary International Law, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man;

9. Order and declare that the detained petitioner is being held in violation of the regulations of the United States Military, the Geneva Conventions, and International Humanitarian Law;

10. Order and declare that the Military Order of November 13, 2001, violates the War Powers Clause;

11. Order and declare that the provision of the Military Order that bars the detained petitioner from seeking relief in this Court is an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution;

14 [sic]. To the extent respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which petitioners may adduce proof in support of his allegations;

15 [sic]. Such other relief as the Court may deem necessary and appropriate to protect petitioners' rights under the United States Constitution and International Law.

Dated: Respectfully submitted,

Counsel for Petitioners:

/s/ L. Barrett Boss (for)
Joseph Margulies
Minnesota Bar No. 208528
MARGULIES & RICHMAN, plc
2520 Park Avenue, South
Minneapolis, MN 55404
612-872-4900
612-872-4967 (fax)

/s/ L. Barrett Boss (for)
Clive A. Stafford Smith
Louisiana Bar No. 14444
P.O. Box 50753
New Orleans, LA 70150-0753
(504) 558-0440

/s/ L. Barrett Boss (for)
Michael Ratner
William Goodman
Anthony DiCaprio
Center for Constitutional Rights
New York, N.Y. 10012
(212) 614-6464
(212) 614-6499 (fax)

/s/ L. Barrett Boss (for)
Stephen John Hopper
Sandroussi & Associates
Solicitors & Barristers
71 Burwood Road
Burwood, NSW 2134
Australia
(61) 02 9744 2344
(61) 02 9744 2377 (fax)

/s/ L. Barrett Boss
L. Barrett Boss*
Bar No. 398100
ASBILL MOFFITT & BOSS, Chtd.
1615 New Hampshire Avenue, N.W.
Suite 200
Washington D.C. 20009
(202) 234 9000 (x119)
(202) 332 6480 (fax)

/s/ L. Barrett Boss (for)
Jon W. Norris*
D.C. Bar No. 426105
The Law Office of Jon W. Norris
641 Indiana Avenue, N.W.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on this 10th day of June, 2002.

/s/ L. Barrett Boss
L. Barrett Boss

* Mr. Norris and Mr. Boss appear as local counsel for all attorneys.

CONSTITUTION OF THE UNITED STATES
Article I

Section 9, Clause 2. Suspension of Habeas Corpus

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 306

LOUIS A. JOHNSON, SECRETARY OF DEFENSE OF THE UNITED STATES, ET AL., PETITIONERS

vs.

LOTHAR EISENTRAGER, ALIAS LUDWIG EHRHARDT, ON HIS OWN BEHALF AND AS NEXT FRIEND OF FRANZ SIEBERT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Excerpts from Joint Appendix to Briefs

* * *

Petition for Writ of Habeas Corpus

Filed April 26, 1948

Comes now your petitioner and to this Honorable Court respectfully represents:

I. That Petitioner, Ludwig Ehrhardt, brings this matter in his own behalf and as next friend of Frans Siebert, Erich Heise, Oswald Ulbricht, Hans Nieman, Ingward Rudloff, Bodo Habenicht, Hans Dethleffs, Heinz Peerschke, Hans Mosberg, Johannes Rathje, Siegfried Fuellkrug, Walther Heissig, Jesco von Puttkamer, Alfred Romain, Walter Richter, Hermann Jaeger, Felix Altenburg,

Herbert Mueller, August Stock, and Maria Muller. The petitioner, together with the afore-mentioned other persons, hereinafter referred to as the prisoners, are confined in the custody of the Commandant of Landsberg prison, which is located in the American occupation zone of Germany.

II. That the respondent, James A. Forrestal, is the Secretary of Defense of the United States; the respondent, Kenneth C. Royall, is the Secretary of the Army of the United States; and the respondent, General Omar Bradley, is the Chief of Staff of the United States Army; and as such the said respondents have jurisdiction and supervision over the official acts of the said Commandant of Landsberg Prison. The said Commandant of Landsberg Prison is not made a respondent hereto because he is not situated within and cannot be served with process within the territorial limits of the United States. He derives his powers and authority from and is subject to the direction of the respondents, all of whom are located within the District of Columbia.

III. That the prisoners were, prior to May 8, 1945, German nationals in the service of the German armed forces in Shanghai, Canton, and Peiping, in China.

IV. That on May 8, 1945, a so-called "Act of Military Surrender" was executed by "Friedeburg", "Keitel", and "Stumpff", purporting to act on behalf of the German High Command, setting forth an "unconditional surrender" to the Supreme Commander, Allied Expeditionary Force and to the Supreme High Command of the Red Army of "all forces on land, at sea, and in the air" who were at that date "under German control". Paragraph four of the said Act provided: "This act of military surrender is without

prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole." (The "Act of Military Surrender" is marked "Exhibit A", attached hereto and made a part hereof.)

On June 5, 1945 there was executed by Dwight D. Eisenhower, G. Zhukov, B. L. Montgomery, and S. de Lattre-Tassigny, at Berlin, the so-called "Berlin Declaration", which recited that the German armed forces had been defeated and had surrendered unconditionally, and had become subject to such requirements as were therein imposed, that there was "no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the Victorious Powers," and which then set forth the terms of the Allied Military Occupation of Germany. (The "Berlin Declaration" is marked "Exhibit B", attached hereto and made a part hereof.) Neither the German High Command nor any other German agency was signatory to nor participant in the "Berlin Declaration", and it was entirely a unilateral pronouncement.

After May 8, 1945, and after June 5, 1945, and until and including August 15, 1945, the Japanese Empire continued to wage war against the United States.

V. That the cities of Shanghai, Canton, and Peiping were, prior to May 8, 1945, and thereafter until August 15, 1945, under the control and domination of the military forces of the Japanese Empire; that during the period of such control and domination, and until August 15, 1945, the prisoners were resident in the said cities and were

subject to the said control and domination of the military forces of the Japanese Empire.

VI. That subsequent to August 15, 1945, twenty-seven persons, including the prisoners and, in addition, Ernest Woerman, Wilhelm Stoller, Elgar von Randow, Herbert Gleitsch, Johannes Otto, and Wolf Schenke (which latter six persons were later acquitted) were taken into custody and held by the Armed Forces of the United States. Twenty-three of the aforesaid persons were served on August 1, 1946, with a charge and bill of particulars, and the remaining four of the said persons were served, on August 28, 1946, with a similar charge and bill of particulars, all under the authority of the Commanding General, Nanking Headquarters Command, a division of United States Forces, China Theater. The charge and bill of particulars (a copy of which marked "Exhibit C" is hereto attached and made a part hereof) alleged violation of the laws of war, to wit: that the accused violated the unconditional German surrender by engaging in, permitting, or ordering military activity against the United States between the German surrender of May 8, 1945, and the cessation of Japanese hostilities on August 15, 1945.

VII. That by paragraph 1, Special Orders No. 120, Headquarters Nanking Headquarters Command dated July 31, 1946 (marked "Exhibit D" hereto attached and made a part hereof), a Military Commission was purported to be constituted for the trial of persons, units, and organizations accused as war criminals within the jurisdiction of the said Nanking Headquarters Command, and upon the completion of such trial or trials to transmit the record thereof, including any judgment or sentence, for action by the appointing authority, viz: the Commanding General of the Nanking Headquarters Command. By letters of

transmittal dated July 31, 1946, and August 1, 15, and 28, 1946, and by first indorsement on each hereof, the aforesaid charges against the 27 accused were referred to be tried in a common trial before the Military Commission (the said documents being marked "Exhibit E", attached hereto and made a part hereof). The aforesaid orders purported to be based on the authority of Letter, Headquarters, United States Forces, China Theater, 21 January 1946, AG000.5 (21 Jan 46) JA, Subject: Regulations Governing the Trial of War Criminals (marked "Exhibit F", attached hereto and made a part hereof).

VIII. That the common trial of the 27 accused began with the arraignment of 23 defendants before the aforesaid Military Commission sitting in courtroom, the Ward Road Jail, Shanghai, China, on August 26, 1946, and the arraignment of the 4 additional accused before the same Military Commission sitting in the same place on September 26, 1946. All of the accused pleaded "not guilty".

IX. That on September 16 and 17, 1946, the Military Commission convened and motions were made on behalf of all of the accused to dismiss the charges on the following grounds (inter alia):

1. That at the time of the German surrender, the accused were not under the control of the German High Command or the German Government, but were under the control of the armed forces of the Japanese Empire,

2. That the unconditional surrender of Germany did not bind the Japanese Empire so as to affect its right to compel cooperation of inhabitants of territory occupied by it,

3. That the acts charged did not constitute war crimes, there being no allegation that the accused had official knowledge or instructions concerning the German surrender,

4. That in the absence of hostilities, martial law, or American Military occupation of China, and in view of treaties between the United States and China dated February 4, 1943, and May 4, 1943, and between Germany and China dated May 18, 1921. The Military Commission was without jurisdiction; all of which motions were denied.

X. That the hearing of the prosecution's case commenced on October 3, 1946, and ended on November 1, 1946, after which all accused moved for findings of not guilty. The motions were allowed with respect to the following six persons:

Ernst Woermann, German Ambassador to Japanese-occupied China.

Wilhelm Stoller, Chief of the Shanghai Office of the German Embassy,

Elgar von Randow, Counselor of the Shanghai Office of the German Embassy,

Herbert Gleitsch, Secretary of the German Consulate at Canton,

Johannes Otto, head of the Nazi Party in South China and leader of the German Community in South China,

Wolf Schenke, member, agent and employee of the Bureau Ehrhardt.

The motions were denied with respect to the remaining twenty-one accused, who are the prisoners for whom this petition is brought.

XI. That the hearing of the defense case commenced on November 13, 1946, and ended on January 14, 1947. On January 17, 1947, the Military Commission rendered its verdict, finding all remaining accused guilty, and sentencing them to confinement at hard labor, as follows:

Ludwig Ehrhardt	Life.
Ingward Rudloff	10 years.
Bodo Habenicht	10 years.
Hans Dethleffs	10 years.
Heinz Peerschke	5 years.
Hans Mosberg	20 years.
Johannes Rathje	15 years.
Walter Richter	10 years.
Hermann Jaeger	10 years.
Jesco von Puttkamer	30 years.
Alfred Romain	30 years.
Franz Siebert	5 years.
Erich Heise	20 years.
Oswald Ulbricht	5 years.
Hans Niemann	5 years.
Felix Altenburg	8 years.
Herbert Mueller	10 years.
Siegfried Fuellkrug	20 years.
Walther Heissig	20 years.
August Stock	5 years.
Maria Muller	5 years.

(The Commission's verdict marked "Exhibit G" is attached here to and made a part hereof.)

XII. That at no time during any of the aforesaid proceedings was the protecting power of Germany notified thereof by the United States, although such notice is required by Article 60 of the Geneva Convention of July

27, 1929, relative to the treatment of prisoners of war, and of Paragraph 133 of the Rules of Land Warfare (FM 27-10), United States War Department, copy of which is marked "Exhibit H" attached hereto and made a part hereof.

XIII. That on May 20, 1947, Major General John P. Lucas, Chief of the United States Army Advisory Group, China, which was the successor, pursuant to War Department radio WCL 34266, dated December 5, 1946, of the Nanking Headquarters Command, acting as Reviewing Authority of the Military Commission, issued his action. The action approved all of the sentences of the Military Commission, but made the following remissions:

Alfred Romain – remitted from 30 to 20 years.
August Stock – remitted from 5 years to 2 years.
Maria Muller – remitted from 5 years to 2 years.

With such modifications, the sentences were ordered executed, Landsberg Prison, Landsberg, Germany, being designated as the place of confinement. (The action of the Reviewing Authority is marked "Exhibit I", attached hereto and made a part hereof.)

XIV. That pursuant to such action, the prisoners were confined and are now confined in Landsberg Prison, Germany, in the custody of the United States Army.

XV. That the detention of the prisoners as convicted war criminals is illegal and in violation of Articles I and III of the Constitution of the United States and of the Fifth Amendment thereto, and of other provisions of said Constitution and laws of the United States and of certain provisions of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, in that:

(a) There being no charge of an offense against the laws of war by the prisoners, the Military Commission was without jurisdiction.

(b) In the absence of hostilities, marital law, or American military occupation of China, and in view of treaties between the United States and China dated February 4, 1943, and May 4, 1943, and between Germany and China, dated May 18, 1921, the Military Commission was without jurisdiction.

(c) The directive of Headquarters, United States Forces, China Theater, (Exhibit F), setting forth the rules of procedure and evidence for the Military Commission, and the action of the Commission thereunder, denied the prisoners the right guaranteed by Article 63 of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, to a trial, "by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power," and the Military Commission was, therefore, without jurisdiction.

(d) The United States not having given notice of the trial to the protecting power of Germany as made mandatory by the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, the Military Commission had no jurisdiction.

XVI. That the prisoners are and continue to be unlawfully confined as convicted war criminals as aforesaid, by the respondents, their agents and subordinates.

Wherefore, Petitioner prays that a Writ of Habeas Corpus be issued by this Court, directed to the respondents, commanding them to produce his body and the

bodies of the other prisoners before your court or some member thereof at a time and place therein to be specified, then and there to receive and do what your Honorable Court shall order concerning their confinement as convicted war criminals, and that the petitioner and the other prisoners be discharged from the offenses and confinement aforesaid.

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT.

* * *

In United States District Court

Order to Show Cause

Filed May 17, 1948

Upon the complaint filed herein in the office of the clerk of this Court and the annexed affidavit of Lothar Eisentrager, alias Ludwig Ehrhardt, verified on the 12th day of April 1948, Let the defendants, and each of them, show cause before this Court, at a stated term thereof, to be held for the hearing of motions, in the U. S. District Court, in the City of Washington, D.C., on the 10th day of June 1948, at 10:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why an order should not be made and entered in the above-entitled action which shall direct that a Writ of Habeas Corpus be issued as requested by the plaintiffs.

Let service of this rule nisi, together with a copy of the complaint and the affidavit hereto annexed, on such of the defendants as may be found within this district on or before the 1st day of June 1948, be deemed sufficient.

(S) T. ALAN GOLDSBOROUGH, *Justice*.

* * *

In United States District Court

Amendment of Petition for Writ of Habeas Corpus

Filed June 10, 1948

Comes now the petitioner, through his attorneys, and respectfully shows to this Honorable Court that the petition herein is amended as follows:

1. Paragraph III of the original petition is deleted and the following paragraph is substituted therefor:

III. That the prisoners were, prior to May 8, 1945, German nationals employed by various civilian agencies of the German Government in Shanghai, Canton, and Peiping, in China as follows:

German Embassy and Consular Service.

Franz Siebert – Consul General at Canton.

Felix Altenburg – Chief, Peiping office, German Embassy.

German Information Bureau (an agency of the German Embassy).

Jesco von Puttkamer.

Alfred Romain.

Bureau Ehrhardt (an agency of the German Embassy).

Lothar Eisentrager, alias Ludwig Ehrhardt.

Erich Heise.

Oswald Ulbricht.

Hans Nieman.

Ingward Rudloff.

Bodo Habenicht.

Hans Dethleffs.

Heinz Peerschke.

Hans Mosberg.

Johannes Rathje.

Siegfried Fuellkrug.

Walther Heissig.

Walter Richter.

Hermann Jaeger.

August Stock.

Maria Muller.

Deutsches Nachrichtenburo (also known as DNB, the German News Agency).

Herbert Mueller.

2. Paragraph XV of the petition is amended by adding thereto a new subparagraph (e), following subparagraph (d), reading as follows:

(e) The prisoners at no time having been members of the armed forces of a nation at war with the United States but having been at all times civilian employees of civilian governmental agencies, they were not belligerents and the Military Commission was accordingly without jurisdiction to try them.

* * *

In United States District Court

Opinion

Filed Oct. 6, 1948

TUESDAY, *September 28, 1948.*

Counsel having been heard on the question of jurisdiction, the opinion of the Court was stated as follows:

The Court (Tamm, J.). This case is before the Court on the petition of a number of war prisoners, who admittedly are not now and have never been in the United States. It is a petition naming the heads of the Department of National Defense as defendants and asks that the plaintiff be permitted the process of habeas corpus. The habeas corpus process is authorized to the District Court through the provisions of sections 451 and 452 of the Judicial Code, which provide:

"Power of Courts: The Supreme Court and the District Courts shall have power to issue writs of habeas corpus.

"Power of Judges: The several justices of the Supreme Court and the several judges of the circuit courts of appeal and the district courts within their respective jurisdictions shall have power to grant writs of habeas corpus for the purpose of an inquiry into the causes of restraints of liberty."

The facts at issue were directly raised before the Supreme Court in its last term, in the case of Paul Ahrens et al. v. Tom C. Clark, Attorney General of the United States, 16 Law Week 4640, in which the Supreme Court specifically passed upon the power of the district courts to issue writs of habeas corpus in cases in which the petitioners are not physically within the jurisdiction of the court.

In that case Justice Douglas, in delivering the majority opinion of the Supreme Court, stated:

"The question at the threshold of the case is whether the words 'within their respective jurisdictions' limited the district courts to inquiries into the causes of restraints of liberties of those confined or restrained within the territorial jurisdictions of the courts."

"That is our view," says Justice Douglas in expressing the majority opinion of the Supreme Court.

It appearing, consequently, that the Supreme Court has specifically passed upon the question of law presented to this Court, the Court bows to that decision and the petition is dismissed.

* * *

Exhibit "C" – Charge

That between 8 May and 15 August 1945, Lothar Eisentraeger alias Ludwig Ehrhardt, Franz Siebert, Herbert Glietsch, Johannes Otto, Erich Heise, Oswald Ulbricht, Hans Niemann, Ingward Rudloff, Bodo Habenicht, Hans Dethleffs, Wolf Schenke, Heinz Peerschke, Hans Mosberg, Johannes Rathje, Siegfried Fuellkrug, Walther Heissig, Jesco von Puttkamer, Alfred Romain, Ernst Woermann, Wilhelm Stoller, Elgar von Randow, Walter Richter, Hermann Jaeger, Felix Altenburg, Herbert Mueller, August Stock, Maria Muller, individually and as officials, nationals, citizens, agents or employees of Germany, while residing in China at a time when the United States of America was at war with Japan, did in China in a Theatre of military operations, knowingly, wilfully and unlawfully violate the unconditional German

surrender by engaging in and continuing military activity against the United States and its allies, to wit, by furnishing, ordering, authorizing, permitting and failing to stop the furnishing of aid, assistance, information, advice, intelligence, propaganda and materials to the Japanese armed forces and agencies thereof, by such acts of treachery assisting Japan in waging war against United States of America, in violation of the laws and customs of war.

Bill of Particulars

1. That between 8 May and 15 August 1945, Lothar Eisentrager, alias Ludwig Ehrhardt, a member of the German Embassy to enemy-occupied China, as head of a German intelligence agency known as the Bureau Ehrhardt, a unit of the German High Command, did individually at Shanghai and by his agents at Shanghai, Canton and Peiping, wilfully and unlawfully engage in military activity, against the United States and its allies, to wit, the collection of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies and transmission of it to the Japanese armed forces; that on or about 8 May 1945, as head of the Bureau Ehrhardt, he did wilfully and unlawfully transmit through the Shanghai Office of the German Embassy in China, a telegram ordering, authorizing and permitting his agents in Canton and Peiping to furnish aid and intelligence to the Japanese armed forces; that he did wilfully and unlawfully order, authorize and permit his agents in Shanghai to furnish aid and intelligence to the Japanese armed forces.

2. That between 8 May and 15 August 1945, Franz Siebert, in his position as German Consul General,

former German Consul General and a leader of the German community at Canton, did at Canton wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, to wit, the collection of military intelligence concerning the United States and its allies and transmission of it to the Japanese armed forces, by persons under his control, namely Erich Heise, Oswald Ulbricht, Hans Niemann and others; and that he did wilfully and unlawfully order and instruct representatives of German business firms, on or about 15 May 1945 to submit to him lists of essential war materials in their possession which lists on or about 1 and 7 June 1945 were submitted by him to the Japanese armed forces enabling them to secure control and make use of said materials; and that he did on or about 15 May 1945 wilfully and unlawfully order all German citizens and nationals in the Canton area, at a called meeting, to obey his commands to continue active assistance to the Japanese authorities under penalty of punishment by the Japanese.

3. That between 8 May and 15 August 1945, Herbert Glietsch, in his position as Secretary and former Secretary of the German Consulate at Canton, as a leader of the German community there, and agent of the German High Command, did at Canton wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies to wit, the collection of intelligence concerning inter alia, land, sea and air movements by the United States and its allies and transmission of it to the Japanese armed forces; by persons under his control, namely Erich Heise, Oswald Ulbricht and Hans Niemann; that he decoded, approved and delivered on or about 15 May 1945 to Erich

Heise, Canton chief of the Bureau Ehrhardt, a German High Command intelligence agency, a telegram dated on or about 8 May 1945 which unlawfully ordered and authorized the continuation of military activity.

4. That between 8 May and 15 August 1945, Johannes Otto, in his position as head of the Nazi Party in South China and a leader of the German community there, did at Canton wilfully and unlawfully authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, to wit, the collection of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies, and transmission of it to the Japanese armed forces by persons of the community under his control, namely Erich Heise, Oswald Ulbricht, Hans Niemann and others.

5. That between 8 May and 15 August 1945, Erich Heise, member and agent of the Bureau Ehrhardt, an intelligence unit of the German High Command and head of its Canton office, known as the Office Heise, did at Canton wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies, and transmission of it and information and advice to the Japanese armed forces; and that he did wilfully and unlawfully order and permit persons under his control, namely Oswald Ulbricht, Hans Niemann and others to engage in the same unlawful activity.

6. That between 8 May and 15 August 1945, Oswald Ulbricht, member and agent of the Bureau Ehrhardt, an intelligence agency of the German High Command, and employed in its office at Canton, known as of the Office

Heise, did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Office Heise knowing it was for the use and benefit of and furnished to the Japanese armed forces.

7. That between 8 May and 15 August 1945, Hans Niemann, member and agent of the Bureau Ehrhardt, an intelligence agency of the German High Command and employed in its office at Canton, known as the Office Heise, did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements, by the United States and its allies and the rendering of other aid, assistance and advice to the Office Heise knowing it was for the use and benefit of and furnished to the Japanese armed forces.

8. That between 8 May and 15 August 1945, Ingward Rudloff, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

9. That between 8 May and 15 August 1945, Bodo Habenicht, a member, agent and employee of the Bureau Ebrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea and air movements, by the United States, and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

10. That between 8 May and 15 August, Hans Dethleffs, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance, and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

11. That between 8 May and 15 August 1945, Wolf Schenke, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai, wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

12. That between 8 May and 15 August 1945, Heinz Peerscheke, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

13. That between 8 May and 15 August 1945, Hans Mosberg, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

14. That between 8 May and 15 August 1945, Johannes Ruthje, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

15. That between 8 May and 15 August 1945, Siegfried Fuellkrug, a member, agent and employee of the Bureau Ehrhardt, an intelligence unit of the German High Command and head of its Peiping office, known as the Office Fuellkrug, did at Peiping wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies and transmission of it and information and advice on political and military conditions, plans and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Bureau Ehrhardt and the Japanese armed forces; and that he did order, permit and authorize persons under his control, to wit, August Stock, Walther Heissing and Maria Muller to engage in such unlawful activity.

16. That between 8 May and 15 August 1945, Walther Heissig, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command and employed in its office at Peiping, known as the Office Fuelkrug, did thereat wilfully and unlawfully engage in military activity agains the United States and its allies, to wit, the collection, translation and compilation of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies and transmission of it and information and advice on political and military conditions, plans and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Bureau of Ehrhardt and the Japanese armed forces; and that he did order, permit and authorize persons under his control, to wit, August Stock and Maria Muller, to engage in similar unlawful activity.

17. That between 8 May and 15 August 1945, Jesco von Puttkamer, in his position as head of the German Information Bureau, Shanghai, a military propaganda agency of the German Embassy to enemy-occupied China, did thereat individually and by his agents wilfully and unlawfully engage in military activity against the United States and its allies, to wit, psychological warfare by designing, preparing and furnishing to the Japanese armed forces for their use propaganda material in the English language consisting of, inter alia, leaflets, posters, and photographs designed to influence, adversely to the United States and its allies, the actions of United States troops and civilian populations; and that he did wilfully and unlawfully furnish military advice, information and intelligence to the Japanese armed forces.

18. That between 8 May and 15 August 1945, Alfred Romain, a member and employee of the German Information Bureau, Shanghai, a military propaganda agency of the German Embassy to enemy-occupied China, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, psychological warfare by designing, preparing and furnishing to the German Information Bureau and to the Japanese armed forces for use by the latter, propaganda material in the English language, consisting of inter alia, leaflets, posters, designs and photographs intended to influence, adversely to the United States and its allies, the actions of United States troops and civilian populations.

19. That between 8 May and 15 August 1945, Ernst Woermann, in his position as German Ambassador to enemy-occupied China, former German Ambassador, head of the German community there and the superior of Lothar Eisentrager, alias Ludwig Ehrhardt, diplomatic

official and head of the Bureau Ehrhardt, a German High Command intelligence agency, and in control of the German Information Bureau, a military propaganda agency, did in China willfully and unlawfully order, authorize, permit and fail to stop German military activity against the United States and its allies, by those under his command and control, to wit, the collection and analysis by the Bureau Ehrhardt of intelligence in Shanghai, Canton and Peiping and preparation by the German Information Bureau of propaganda material in Shanghai against the United States and its allies and transmission of both to the Japanese armed forces for their use.

20. That between 8 May and 15 August 1945, Wilhelm Stoller, in his position as chief of the Shanghai Office of the German Embassy to enemy-occupied China, and the superior of Lothar Eisentrager, alias Ludwig Ehrhardt, diplomatic official and head of the Bureau Ehrhardt, a German High Command intelligence agency, and in control of the German Information Bureau, a military propaganda Agency, as former chief of such Embassy Office and a head of the German community in Shanghai, did at Shanghai wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, by those under his command and control, to wit, the collection by the Bureau Ehrhardt of intelligence in Shanghai, Canton and Peiping and preparation by the German Information Bureau of propaganda material in Shanghai against the United States and its allies and transmission of both to the Japanese armed forces; that unlawful activity of intelligence nature took place in Canton and Peiping pursuant to his direction and approval expressed in a telegram to the German Consulate

at Canton and the Embassy Office at Peiping signed by him, dated on or about 8 May 1945 and duly delivered.

21. That between 8 May and 15 August 1945, Elgar von Randow, in his position as Counselor of the Shanghai Office of the German Embassy to enemy-occupied China and the immediate superior of Lothar Eisentrager, alias Ludwig Ehrhardt, diplomatic official and head of the Bureau Ehrhardt, a German High Command intelligence agency, and in immediate control of the German Information Bureau, a military propaganda agency, as former counselor of such office and a head of the German community in Shanghai, did at Shanghai, wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, by those under his command and control, to wit, the collection by the Bureau Ehrhardt of intelligence in Shanghai, Canton and Peiping and preparation by the German Information Bureau of propaganda material in Shanghai against the United States and its allies and transmission of both to Japanese armed forces; that unlawful activity of intelligence nature took place in Canton and Peiping pursuant to his direction and approved expressed in a telegram to the German Consulate at Canton and the Embassy Office at Peiping, approved and dispatched by him on or about 8 May 1945, and duly delivered.

22. That between 8 May and 15 August 1945, Walter Richter, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and is allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land,

sea and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

23. That between 8 May and 15 August 1945, Herman Jaeger, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea and air movements of the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

24. That between 8 May and 15 August 1945, Felix Altenburg, in his position as chief of the Peiping Office of the German Embassy to enemy-occupied China and the Superior of Siegfried Fuellkrug who was a member of the Embassy staff and head of the Peiping unit of the German High Command's intelligence agency in China, namely the Bureau Ehrhardt, as former chief of such Embassy Office and a leader of the Germany community at Peiping, did at Peiping wilfully and unlawfully, order, authorize, permit and fail to stop the continuation by persons under his control, to wit, Siegfried Fuellkrug, Walther Heissig, Herbert Mueller, August Stock, Maria Muller and others, of military activity against the United States and its allies, to wit, the collection of intelligence concerning, inter alia, land, sea and air movements by the United States and its allies, and transmission of it and analysis of and advice on political and military conditions, plans and happenings in North China, Mongolia and the Union of

Soviet Socialist Republics and other nations allied with the United States to the Japanese armed forces.

25. That between 8 May and 15 August 1945, Herbert Mueller, in his position as agent of the Peiping office of a German government news and propaganda agency, Deutsches Nachrichtenburo, also known as DNB, did at Peiping wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, interpretation, edition, analysis and transmission to the Japanese armed forces of economic, political and military intelligence, including that which he daily intercepted from radio broadcasts by the United States and its allies.

26. That between 8 May and 15 August 1945, August Stock, member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, and employed in its office at Peiping known as the Office Fuellkrug did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, translation and analysis of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies, and transmission of it and information on political and military conditions, plans and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Japanese armed forces and to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

5 Yrs. [Reduced to 2 Yrs.]

27. That between 8 May and 15 August 1945, Maria Muller, member agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High

Command and employed in its office at Peiping known as the Office Fuellkrug, did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, translation and analysis of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies and transmission of it and information on political and military conditions and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Japanese armed forces and to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

Exhibit "F"

Restricted

HEADQUARTERS,
UNITED STATES FORCES, CHINA THEATER.

APO 971

AG 000.5 (21 Jan 46) JA *21 January 1946.*

Subject: Regulations Governing the Trial of War Criminals

The following rules and regulations will govern the trials of persons, units and organizations accused as War Criminals in this theater:

ESTABLISHMENT OF MILITARY COMMISSIONS

1. General. Trial of persons, units, and organizations accused as War Criminals will be by military commissions to be convened by the Commanding General, United States Army Forces, China Theater.

2. Number and Types. The number and types of commissions to be established will depend upon the number and nature of the offenses involved and of the offenders to be tried. Such commissions may include members of any one branch or of several branches of the armed services, to try cases involving offenses against any one or more of such service branches, or any other offenses.

JURISDICTION

3. Over Territory. The military commissions established hereunder shall have jurisdiction over all of China, co-existensive with the China Theater of Operations, and territory now or formerly belonging to China, including Formosa, Manchuria, and Hainan Island, and other areas wherein the armed forces commanded by the Commanding General, United States Army Forces, China Theater, are or have been stationed.

4. Over Persons. a. The military commissions established hereunder shall have jurisdiction over all persons, units or organizations within China Theater of Operations including Formosa, Manchuria and Hainan Island and other areas wherein the armed forces, commanded by the Commanding General, United States Army Forces, China Theater are or have been stationed.

b. Any military or Naval unit or any official or unofficial group or organization, whether or not still in existence, may be charged with criminal acts or complicity therein and tried by a military commission.

c. The convening authority may specify particular offenders to be tried before any commission appointed by him.

5. Over Offenses. a. The military commissions established hereunder shall have jurisdiction over the following offenses: Violations of the laws or customs of war, including but not limited to murder, torture or ill-treatment of prisoners of war or persons on the seas; killing or ill-treatment of hostages; murder, torture or ill-treatment, or deportation to slave labor or for any other illegal purposes, of civilians of, or in, occupied territory; plunder of public or private property; wanton destruction of cities, towns or villages; devastation, destruction or damage of public or private property not justified by military necessity; murder, extermination, enslavement, deportation or other inhuman acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offense within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offenses against the laws or customs of war; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy.

b. Persons whose offenses have a particular geographical location outside the China Theater of Operations may be returned to the scene of their crimes for trial by competent military or civil tribunals of local jurisdiction. In the event a person is requested for trial in two (2) or

more countries, the Commanding General, United States Army Forces, China Theater, will determine the place of trial on the basis of the relative gravity of the respective charges and other relevant circumstances.

MEMBERSHIP OF COMMISSION

6. Appointment. The members of each military commission will be appointed by the Commanding General, United States Army Forces, China Theater, or under authority delegated by him. The appointment may be made in the order convening the commission or in a separate order. Alternates may be appointed by the convening authority. Such alternates shall attend all sessions of the commission and in case of illness or other incapacity of any principal member, an alternate shall take the place of that member. Any vacancy among the members or alternates occurring after a trial has begun may be filled by the convening authority, but the substance of all proceedings had and evidence taken in that case shall be made known to that new member or alternate in open court before the trial proceeds.

7. Number of Members. Each commission shall consist of not less than three (3) members.

8. Qualifications. The convening authority shall appoint to the commission, persons whom he determines to be competent to perform the duties involved and not disqualified by personal interest or prejudices; provided, that no person shall be appointed to hear a case which he personally investigated, nor if he is required as a witness in that case. A commission may consist of Army and other

service personnel, or of both service personnel and civilians. If feasible, one or more members of a commission should have had legal training.

9. Quorum and Voting. A quorum shall consist of two-thirds (⅔) of the members of the commission, or alternates (if any) acting as members, but in no event less than three (3) members. All decisions of the commission shall be by majority vote of the members present when the vote is taken, which shall be a quorum, except that conviction and sentence shall be by the affirmative votes of not less than two-thirds (⅔) of the members of the quorum. In case of a tie vote, the vote of the presiding member will determine.

10. Presiding Member. In the event the convening authority does not name one of the members as the presiding member the senior officer among the members of the commission present shall preside, or such other member as the senior officer may designate.

PROSECUTORS

11. Appointment. The convening authority shall designate one or more persons to conduct the prosecution before each commission.

12. Duties. The duties of the prosecutor are:

a. To determine the offenses and the offenders to be tried before the commission in addition to those specifically ordered by the convening authority.

b. To prepare and present to the commission charges and specifications.

c. To prepare cases for trial and to conduct the prosecution of each case before the commission.

POWERS AND PROCEDURE OF COMMISSIONS

13. Conduct of the Trial. A Commission shall:

a. Confine each trial strictly to a fair, expeditious hearing on the issues raised by the charges, excluding irrelevant issues or evidence and preventing any unnecessary delay or interference.

b. Deal summarily with any contumacy or contempt, imposing any appropriate punishment therefor.

c. Sessions of a commission shall be public except when otherwise directed by the commission.

d. A commission shall hold each session at such time and place as it shall determine or as may be directed by the convening authority.

14. Rights of the Accused. The accused shall be entitled:

a. To have in advance of trial a copy of the charges and specifications, so worded as clearly to apprise the accused of each offense charged.

b. To be represented prior to and during trial by counsel of his own choice, or to conduct his own defense. If the accused fails to designate his counsel, the commission shall appoint competent counsel to represent or advise the accused.

c. To have his own counsel present relevant evidence at the trial in support of his defense, and cross-examine

each adverse witness who personally appears before the commission.

d. To have the charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them.

15. Witnesses. The commission shall have power:

a. To summon witnesses and require their attendance and testimony under penalty; to administer oaths or affirmation to witness and other persons, and to question witnesses.

b. To require the production of documents and other evidentiary material.

c. To have evidence taken by a special commissioner appointed by the commission.

16. Evidence. a. The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charges, or such as in the commission's opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.

(2) Any report which appears to the commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical

service personnel or by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report.

(3) Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority.

(4) Any diary, letter or other document appearing to the commission to contain information relating to the charge.

(5) A copy of any document or other secondary evidence of its contents.

(6) Hearsay evidence.

b. The commission shall take judicial notice of facts of common knowledge, official government documents of any nation, and the proceedings, records and findings of military or other agencies of any of the United Nations.

c. A commission may require the prosecution and the defense to make a preliminary offer of proof, whereupon the commission may rule in advance on the admissibility of such evidence.

d. If the accused is charged with an offense involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial of any other member of that, unit, group or organization, relative to that concerted offense, may be received as prima facie evidence that the accused likewise is guilty of that offense.

e. The findings and judgment of a commission in any trial of a unit, group or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in such unit, group or organization convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein.

f. The official position of the accused shall not absolve him from responsibility, or be considered in mitigation or punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires.

17. Trial Procedure. The proceedings at each trial will be conducted substantially as follows, unless modified by the commission to suit the particular circumstances:

a. Each charge and specification will be read, or its substance stated, in open court.

b. The presiding member shall ask each accused whether he pleads "Guilty" or "Not Guilty".

c. The prosecution shall make its opening statement.

d. The presiding member may, at this or any other time, require the prosecutor to state what evidence he proposes to submit to the commission, and the commission thereupon may rule upon the admissibility of such evidence.

e. The commission may put any question to any witness and to any accused at any time. The prosecution and the defense may then further examine and or cross-examine any such witness or accused.

f. The witnesses and other evidence for the prosecution shall be heard or presented. At the close of the case for the prosecution, the commission may, on motion of the defense for a finding of not guilty, consider and rule whether the evidence before the commission supports the charges against the accused. The commission may defer action on any such motion and permit or require the prosecution to reopen its case and produce any further available evidence.

g. The defense may make an opening statement prior to presenting its case. The presiding member may, at this or any other time, require the defense to state what evidence they propose to submit to the commission, whereupon the commission may rule upon the admissibility of such evidence.

h. The witnesses and other evidence for the defense shall be heard or presented. Thereafter, the prosecution and defense may introduce such evidence in rebuttal as the commission may rule admissible.

i. The defense, and thereafter the prosecution, shall address the commission.

j. The commission shall consider the case in closed session and thereafter in open court deliver its judgment, and in the event of a conviction shall pronounce sentence.

18. Record of Proceedings. Each commission shall make a separate record of its proceedings in the trial of each case brought before it. The record shall be prepared

by the prosecutor under the direction of the commission and submitted to the defense counsel. The commission shall be responsible for its accuracy. Such record, certified by the presiding member of the commission or his successor, shall be delivered to the convening authority as soon as possible after the trial.

Judgment and Sentence

19. Judgment. The judgment of a commission as to guilt or acquittal shall be delivered in open court. It may state the reasons on which based.

20. Sentence. The commission may sentence an accused, upon conviction, to death by hanging or shooting, imprisonment for life or for any less term, fine, or such other punishment as the commission shall determine to be proper. The commission may also order confiscation of any property of a convicted accused, deprive that accused of any stolen property, or order its delivery to the Commanding General, United States Army Forces, China Theater, for disposition as he shall find be proper, or may order restitution with appropriate penalty in cases of default.

21. Approval of Sentence. No sentence, including the death sentence, of a military commission shall be carried into effect until approved by the Commanding General, United States Army Forces, China Theater, or his successor. He shall have authority to approve, mitigate, remit, commute, suspend, reduce or otherwise alter the sentence imposed, or (without prejudice to accused) remand the case for rehearing before a new military commission; but he shall not have authority to increase the severity of the sentence. Except as herein provided, the judgment and sentence and interlocutory rulings of a commission shall

be final and not subject to review. No appeal may be taken from the judgment and/or sentence of a commission to any civil court or higher military authority.

RULE MAKING POWER

22. Supplementary Rules and Forms. Each commission shall adopt rules and forms to govern its procedure, not inconsistent with the provisions hereof or such rules and forms as may be prescribed by the convening authority to-wit, the Commanding General, United States Army Forces, China Theater.

By Command of Lieutenant General Wedemeyer:

(S) PAUL W. CARAWAY,
Brigadier General, GSC,
Acting Chief of Staff.

* * *

Respondents' Exhibit Four

War Department, Classified Message Center,
Outgoing Classified Message

Paraphrase Not Required. Handle as Secret Correspondence per Paras 51 (i) and 60 (a). AR 380-5

Joint Chiefs of Staff,
Col. C.R. Peck, Inf.,
W.D. Extension 77500.
6 July 1946
Classification Cancelled per
SANACC Downgrading Proceedings on SWNCC211 7

(S) FRANK F. MITER,
Col. GSG, 28 May 1948

COMGENUSAFC, Shanghai, China
Number: WAR 93586

To Wedemeyer from the Joint Chiefs of Staff.
Your radio CFB-28889 refers.

Authority granted, provided the Chinese Government acquiesces, to appoint United States Military Commission in China for the trial of violation of the laws and customs of war and German soldiers, civilians, and consular officials, and such other persons as you may determine, who are charged with violation of German surrender terms; to proceed with the trials; and to approve and execute sentences, including the death penalty subject to review prescribed by the Commanding General of the U.S. Army Forces in China. You are further authorized to designate Germany as the place of confinement and execution of sentences of such convicted Germans as you may determine.

Office of Military Government for Germany (U.S.) concurs.

Note: CFB 28889 is CM-IN 4053 (19 April 46).
ORIGINATOR: JC/S
DISTRIBUTION: Admiral Leahy, CG AAF, D/PA, D/I D/SSP, D/PO, CAD, Admiral Nimitz, TAG, Servat, Mr. Petersen, Mr. Royall, C. of S.
CM-OUT-93586 (July 46) DTG 061703Z jjF

* * *

Nos. 03-334, 03-343

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
JARED A. GOLDSTEIN
HEATHER LAMBERG KAFELE

SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-508-8000
Facsimile: 202-508-8100
Attorneys for Petitioners

January 14, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

LIST OF PARTIES AND CORPORATIONS

The following Kuwaiti nationals who are imprisoned at Guantanamo Bay Naval Base appeared below as plaintiffs: Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Abdulaziz Sayer Owain Al Shammari, Abdullah Saleh Ali Al Ajmi, Mohammed Funaitel Al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdull Mohssin Al Zamil, and Saad Madai Saad Al Azmi. The following additional Kuwaiti nationals, who are family members of the Kuwaiti nationals listed above, also appeared below as plaintiffs: Khaled A.F. Al Odah, father of plaintiff Fawzi Khalid Abdullah Fahad Al Odah; Mohammad R.M.R. Ameen, brother of plaintiff Omar Rajab Amin; Nayef N.N.B.J. Al Mutairi, brother of plaintiff Nasser Nijer Naser Al Mutairi; Meshal A.M.T.H. Al Mutairi, brother of plaintiff Khalid Abdullah Mishal Al Mutairi; Mansour K.A. Kamel, brother of plaintiff Abdullah Kamal Abdullah Kamal Al Kandari; Sayer O.Z. Al Shammari, father of plaintiff Abdulaziz Sayer Owain Al Shammari; Mesfer Saleh Ali Al Ajmi, brother of Abdullah Saleh Ali Al Ajmi; Mubarak F.S.M. Al Daihani, brother of plaintiff Mohammed Funaitel Al Dihani; Mohammad A.J.M.H. Al Kandari, father of plaintiff Fayiz Mohammed Ahmed Al Kandari; Monzer M.H.A. Al Rabieah, brother of plaintiff Fwad Mahmoud Al Rabiah; Walid Z.A. Al Zamel, brother of plaintiff Adil Zamil Abdull Mohssin Al Zamil; and Hamad Madai Saad, brother of plaintiff Saad Madai Saad Al-Azmi (collectively the "Family Members").

LIST OF PARTIES AND CORPORATIONS – Continued

The following appeared below as defendants: the United States of America; George W. Bush, President of the United States; Donald H. Rumsfeld, Secretary of Defense; General Richard B. Myers, Chairman of the Joint Chiefs of Staff; Brigadier General Rick Baccus, Commander of Joint Task Force-160, and Colonel Terry Carrico, Commandant of Camp X-Ray/Camp Delta.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 321 F.3d 1134 (D.C. Cir. 2003) and is reprinted in the Appendix to Petition for Writ of Certiorari ("Pet. App.") 1. The orders denying a petition for rehearing and rehearing *en banc* are reprinted at Pet. App. 72, 73. The opinion of the district court is reported at 215 F. Supp. 2d 55 (D.D.C. 2002) and is reprinted at Pet. App. 33.

JURISDICTION

The petition for rehearing and rehearing *en banc* was denied on June 2, 2003. A petition for a writ of certiorari was timely filed on September 2, 2003, and the Court granted the petition on November 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment V; 5 U.S.C. § 702; 28 U.S.C. §§ 1331, 2241-2243; Military Order No. 1, 66 Fed. Reg. 57,833; and U.S. Army Regulation 190-8, Washington, D.C. (October 1, 1997).

STATEMENT OF THE CASE

1. On September 11, 2001, terrorists attacked the United States, highjacking commercial airliners and flying them into the World Trade Center in New York City and the Pentagon, killing thousands of innocent people. Joint Appendix ("J.A.") 21-22. In the wake of the attack, apparently executed by the terrorist organization known as al Qaida, President Bush launched a military campaign against al Qaida, headquartered in Afghanistan, and the Taliban regime that supported al Qaida. *Id.* at 22.

On November 13, 2001, the President issued a Military Order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in The War Against Terrorism" (the "Military Order").[1] Section 1 of the Military Order recites

[1] 66 Fed. Reg. 57,833 (Nov. 16, 2001).

"Findings" about the terrorist attacks, including a finding that "it is necessary for individuals subject to this order . . . to be detained." Those subject to the Military Order are defined in Section 2(a) to be "any individual who is not a United States citizen with respect to whom [the President] determine[s] from time to time in writing" that "there is reason to believe that such individual, at the relevant times . . . is or was a member of the organization known as al Qaida [or] has engaged in, aided or abetted, or conspired to commit, acts of international terrorism. . . ." The Military Order states that "any individual subject to this order [shall be] detained at an appropriate location designated by the Secretary of Defense outside or within the United States. . . ."[2]

2. Petitioners are 12 citizens of the State of Kuwait who were in Pakistan and Afghanistan serving as charitable volunteers to provide humanitarian aid to the people of those countries. J.A. 24. To the best knowledge of their families, none of the petitioners is or ever has been a member or supporter of al Qaida, the Taliban, or any terrorist organization, or has ever engaged in or supported any terrorist or hostile act against the United States. *Id.* at 25. However, sometime after September 11, 2001, the petitioners were seized against their will in Pakistan and Afghanistan by local villagers seeking bounties and other financial rewards from the United States. *Id.* Subsequently, they were taken into custody by the United States. *Id.*

The President made no determination that there is reason to believe any of the petitioners is or was a member of al Qaida or has engaged in any act of terrorism and is therefore subject to detention under the Military Order. *Id.* Nevertheless, beginning on January 11, 2002, the petitioners were forcibly transported by the United States to the Guantanamo Bay Naval Base ("Guantanamo"), and

[2] Military Order §§ 2(b), 3.

they have been imprisoned there by the United States ever since. *Id.* at 26.

Respondents are not holding the petitioners as prisoners of war under the Geneva Conventions, which would confer upon them a recognized status and defined rights, including release at the end of hostilities. *Id.* at 31. Instead, respondents have placed the petitioners in a legal "black hole" for more than *two years*, during which none has been charged with any offense, permitted to meet with members of his family or counsel, or been allowed access to any impartial tribunal. *Id.* at 29.[3]

3. In 1903, in withdrawing its occupying forces after the Spanish-American War, the United States entered into a lease with the newly formed Republic of Cuba for the territory that now forms Guantanamo. The lease provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [Guantanamo], on the other hand the Republic of Cuba consents that during the period of occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain. . . .[4]

The lease continues in perpetuity unless the United States agrees to terminate it.[5]

[3] The Secretary of Defense and other Defense Department officials have publicly acknowledged that an undetermined number of detainees at Guantanamo are '"victims of circumstance'" who are "innocent" and "shouldn't have been brought" to Guantanamo. Pet. App. 94.

[4] Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418.

[5] Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. 866.

4. Petitioners filed their complaint in the district court on May 1, 2002, and amended it on July 8, 2002, seeking modest but essential relief. J.A. 14. They neither challenge their initial capture nor seek immediate release from confinement. Rather, they ask only that they be accorded fundamental rights during their confinement: that they be informed of the charges, if any, against them; that they be allowed to meet with their families and counsel; and that they be afforded access to an impartial tribunal to review whether any basis exists for their continued imprisonment. J.A. 34. They ask for those rights subject to any restrictions that might reasonably be necessary to protect national security. *Id.* They allege that the denial of these rights violates the Constitution, international law, and treaties of the United States, and is arbitrary, capricious, and contrary to federal law and regulations. *Id.* The petitioners invoked the district court's jurisdiction under 28 U.S.C. § 1331 (federal question), among other statutory bases, and further asserted that the district court was empowered to grant them relief under 28 U.S.C. § 2243 (habeas corpus). J.A. 19-20.

The district court dismissed the amended complaint for lack of jurisdiction. Pet. App. 33. Relying upon *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the court held that it had no jurisdiction to entertain petitions for writs of habeas corpus filed by aliens detained outside the sovereign territory of the United States. *Id.* at 67. The court made no mention of section 1331, the primary basis of jurisdiction alleged in the complaint.

5. On March 11, 2003, the court of appeals affirmed the dismissal, largely on the basis of this Court's decision in *Eisentrager*. Although the court of appeals assumed, for purposes of its decision, that petitioners are not "enemy aliens," as were the *Eisentrager* petitioners, and have not engaged in hostilities against the United States, as had the *Eisentrager* petitioners, it nevertheless read *Eisentrager* to mean that "constitutional rights . . . are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens." Pet. App. 13. As a result, the court of appeals concluded that

"no court in this country has jurisdiction to grant habeas relief" to the detainees. *Id.* at 14. Further, the court of appeals held that, even if the petitioners' claims "do not sound in habeas," the "courts are not open to them." *Id.* at 20-21. The court of appeals rejected petitioners' argument that, even if *Eisentrager* supported these propositions, they should not be extended to foreign nationals held at Guantanamo because the United States exercises complete control and jurisdiction there. *Id.* at 16-19. The court of appeals held that Cuba's technical "sovereignty" over Guantanamo, rather than United States' exclusive jurisdiction and control, was determinative. *Id.*

SUMMARY OF ARGUMENT

Petitioners have been jailed at Guantanamo for over two years. They were taken there without any written determination, as required by the President's Military Order, that there was "reason to believe" that they were connected with terrorism. They specifically allege in their complaint that they were not. Yet, for over two years petitioners have been denied access to any impartial tribunal to hear their claims and determine if a basis exists for their detentions. If the government is correct that U.S. courts lack jurisdiction, they may be held this way forever, without charge or trial or a hearing of any kind. The courts could never review their detentions, no matter how long they are held, no matter how arbitrary their detentions might be, and no matter how they are treated.

No decision of this Court or any other authorizes that result. It is contrary to our most fundamental traditions.

It is also contrary to the statutes enacted by Congress defining the jurisdiction of the federal courts. Petitioners allege that the government's decisions and actions denying them access to their families and counsel and to any impartial tribunal violate the Constitution and the laws and treaties of the United States, and are arbitrary and capricious within the strictures of the Administrative Procedure Act (the "APA"). Jurisdiction to hear these

claims is explicitly conferred by 28 U.S.C. § 1331 (jurisdiction to hear "all civil actions arising under the Constitution, laws, or treaties of the United States") and 28 U.S.C. § 2241(c)(3) (jurisdiction to issue writs of habeas corpus for prisoners "in custody in violation of the Constitution or laws or treaties of the United States").

This Court has long and repeatedly held that broad jurisdictional grants like these give the courts created by Congress authority to review executive actions, particularly when the actions deprive individuals of their liberty. Restrictions of that judicial authority are not to be implied in the absence of a clear and unambiguous congressional statement restricting or repealing the courts' jurisdiction. No enactment by Congress even arguably restricts or repeals the courts' jurisdiction in the circumstances of the present case or licenses the executive to act in Guantanamo without accountability to the Constitution, laws, or treaties of the United States.

There is a reason why this Court has always insisted on the most explicit kind of statement before it will find that Congress has withdrawn judicial jurisdiction to test executive actions injurious to personal freedom against the basic commands of law. Congress is not presumed to intend to sweep all of our traditions into the fire unless it says so directly. And those traditions attest with absolute clarity to the essential role of independent judicial judgment in ensuring that the freedoms which this Nation was created to preserve and protect are not lost through unrestrained zeal on the part of executive officers to do everything they think efficient to avert perceived threats to the nation's safety.

Our nation was the first to be deliberately founded on principles of individual liberty, fundamental fairness, and justice under law. Those principles were embodied in our Constitution and safeguarded through its structure of separated powers. An independent judiciary with authority to check the excesses of executive action that are particularly likely to occur in times of stress and danger was considered essential to ensure that freedom and the

rule of law would not be disregarded or sold short whenever, in the view of the executive, they were inconvenient impediments to the executive's policies for addressing the exigencies of the moment.

The need for judicial oversight was always considered greatest to protect against arbitrary detention. As Alexander Hamilton explained: "[T]he practice of arbitrary imprisonment [has] been, in all ages, the favorite and most formidable instrument of tyranny. . . . And as a remedy for this fatal evil [Blackstone] is everywhere peculiarly emphatical in his encomiums on the habeas-corpus act, in which one place he calls the 'BULWARK of the British Constitution.'"[6] Significantly, when Hamilton wrote those words, before our Constitution was adopted, it was already well established under the common law that jurisdiction to issue writs of habeas corpus was not restricted to citizens or confined within the borders; it extended to non-enemy aliens and persons held in custody in areas outside the sovereignty but subject to the control of the Crown.

Any retreat from this principle—and, in particular, any rule disjoining the territorial reach of judicial authority from the territorial reach of plenary executive power—would encourage manipulation by executive officials anxious to avoid having to defend their conduct against charges that it is unwarranted in law or baseless in fact. To erect a categorical geographic boundary beyond which the executive has total power to act but the courts have no jurisdiction to examine that action is to allow the executive itself to decide whether its actions can or cannot be called to account under the law. By the simple expedient of electing to hold its prisoners offshore, the executive could divest the courts of jurisdiction and insulate its actions from review.

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[6] THE FEDERALIST NO. 84 (Alexander Hamilton) (quoting 4 William Blackstone, COMMENTARIES 438).

That was the purpose here. A recently released paper makes clear that the government selected Guantanamo as its prison site largely to avoid court review of its actions.[7]

But petitioners are not challenging the ministerial actions of the jailers at Guantanamo. Rather, they challenge the administrative decisions that were made to deny them access to their families and to counsel and, most importantly, to any impartial tribunal to review whether a basis exists for their detentions. Those decisions were made in the United States, and apparently at the highest levels of government, and the orders to follow them were issued from the United States. To allow government officials acting within the United States to insulate the decisions they make here from court review simply by holding their prisoners outside the borders would deprive the judiciary of its essential function as a check on the power of the executive. Authorizing them to do so violates the very essence of the separation of powers that the Constitution's framers implemented to guard against tyranny.

With no support from Congress, the government bases its claim that the courts lack jurisdiction on this Court's decision in *Johnson v. Eisentrager*. It argues in effect that *Eisentrager* provides it with absolute immunity from judicial oversight whenever it elects to hold foreign nationals in custody outside U.S. sovereign territory. But that argument goes far beyond *Eisentrager*.

Eisentrager stands for the sensible proposition that enemy aliens, who had been tried and convicted overseas by a duly constituted military tribunal established under law, could not obtain review of their convictions in the U.S. civil courts. The Court did not hold in that case that aliens who had *not* been tried or convicted, or even charged,

[7] *See* Col. Daniel F. McCallum, *Why GTMO*? (hereinafter "McCallum, *Why GTMO*?") at 6, available at the website of the National War College, http://www.ndu.edu/nwc/writing/AY03/5603/5603G.pdf (visited Jan. 9, 2004).

could be detained indefinitely without even a hearing—just because they were kept outside our borders. As Justice Jackson, who authored the *Eisentrager* opinion, later pointed out: "Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates."[8]

Eisentrager also did not deal with the detention of friendly aliens—that is, citizens of allied nations—as to whom no presumption of enemy status could be made. *Eisentrager* actually supports petitioners' claim that, as citizens of an allied nation, they are entitled to a hearing at least to determine whether they are in fact enemies of the United States.

Finally, Guantanamo is not like China, where the petitioners in *Eisentrager* were tried and convicted, or Germany, where they were imprisoned. Guantanamo, "for all practical purposes, is American territory."[9] Although Cuba does retain "ultimate" sovereignty over Guantanamo, and therefore would ultimately regain sovereignty if the United States ever decides to terminate its perpetual lease rights there, there is no doubt that the United States exercises full current sovereignty over and within Guantanamo. It has complete jurisdiction and control there. There is no possibility of a conflict with the laws of any other nation, or of an appeal to any other nation's courts, because only United States laws apply there, and only the U.S. courts have jurisdiction. The idea that the United States can warehouse prisoners in Guantanamo outside the law and without review by U.S. courts has no support in the *Eisentrager* decision.

[8] *Shaughnessy v. United States*, 345 U.S. 209, 219 (1953) (Jackson, J., dissenting).

[9] The History of Guantanamo Bay: An Online Edition (1964), at 7-8 available at the official Navy website www.nsgtmo.navy.mil/history.htm (hereinafter "U.S. Navy Website").

The Court in *Eisentrager* also emphasized that its decision was fully in accord with international law. The government's treatment of the Kuwaiti detainees clearly is not. No principle is more settled in international law today than that an individual may not be deprived of liberty by government authority without access to an impartial tribunal established by law. The idea that this or any nation can go around the world rounding up aliens and imprisoning them outside the rule of law and without court review is simply anathema to the law of civilized nations.

The Geneva Conventions mandate that a "competent tribunal" review the status of any detainee as to whom there is any doubt. Numerous international treaties require a prompt impartial review of any decision by a government to deprive a person of liberty. This Court has long recognized that, to the extent possible, United States law should be interpreted in accordance with settled international principles. As much force as that doctrine has when the United States is acting with respect to its own citizens, it has particular importance in this case where the people being detained are citizens of allied nations who would otherwise be entitled to the protection of those principles were they not held in exclusive U.S. custody.

The government appears to believe that federal court jurisdiction would threaten our national security. But our Constitution, drafted with a great war fresh in mind, was not written to exempt executive action from court oversight in times of crisis. As Chief Judge Cranch stated almost two hundred years ago:

> [W]hen the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite or alarm, it is the duty of a court to be peculiarly watchful. . . . The Constitution was made for times of commotion. In the calm of peace and prosperity, there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.[10]

The courts should certainly pay considerable deference to the executive in times of crisis, and they have the wisdom and the experience to do so. But the government here is not asking for deference. It contends that the courts do not even have the authority to defer; that they lack jurisdiction even to examine the government's actions. The courts' role may be limited in times of crisis, but they must have a role to play. They must have the authority to defer. They must be able to ask of the executive why the restrictions it has imposed are necessary, and some reason must be given to which deference is due.

Judicial review does not threaten national security; rather, it ensures that measures taken in response to the nation's need for security remain consistent with its democratic principles of fundamental fairness and liberty. The President of the Israel High Court of Justice has emphasized the critical role that judges play in fighting terrorism:

> While terrorism poses difficult questions for every country, it poses especially challenging questions for democratic countries, because not every effective means is a legal means. . . . We, the judges in modern democracies, are responsible for protecting democracies both from terrorism and from the means that the state wants to use to fight terrorism. . . .
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> The power of society to stand up against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values.[11]

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[10] *United States v. Bollman*, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (Cranch, C.J., dissenting).

[11] Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 148-51 (2002).

Accepting jurisdiction will not open the floodgates to litigation. It is not necessary that an Article III court itself review the basis for each individual detention. What is necessary is that some legal process apply and that the federal courts have jurisdiction to ensure that one does. Just as the Court in *Eisentrager* had jurisdiction at least to determine if the petitioners there were convicted by a properly constituted military tribunal, so here must the courts have jurisdiction to determine if individuals are detained in accordance with some valid legal process.

The government must have authority to detain people who pose a danger to the nation. But there must be some legal process—some impartial review—to distinguish those who are dangerous from those who have been swept up without basis. The government's own regulations, incorporating the requirements of the Geneva Conventions, establish such a process. Applied in each of our recent conflicts, that process has been ignored at Guantanamo. But such a process is particularly important in the new war on terrorism, precisely because the enemy is so amorphous and the danger of mistake so great.

Depriving individuals of their liberty without a process can be justified only for so long as it takes to put a process in place. Nothing more strikingly demonstrates the need for judicial oversight than that, without it, after more than two years, in a place far from the battlefield, the government still has not put a process in place.

The executive may conduct that process—and, indeed, the government's regulations call for it to do so—but the judiciary must stand watch. Barring the judiciary from playing that role violates the basic separation of powers designed by our framers to secure liberty.

ARGUMENT

This case stirs fundamental questions about the judicial function in a constitutional democracy dedicated to the rule of law. The government has argued, and the court of appeals agreed, that the judiciary lacks power to consider petitioners' claims of unlawful detention because petitioners are aliens held by the government outside the

territorial sovereignty of the United States. That conclusion, if accepted, would deny the courts their historic role as a check on executive power and would cede to the executive unreviewable authority to confine petitioners indefinitely. Such a result would raise grave constitutional questions. Those questions need not be addressed, however, because the jurisdiction of the federal courts over petitioners' case is plainly conferred by statutes enacted by Congress, and no action of Congress or this Court calls that jurisdiction into question. A consideration of the relevant statutes in light of canons of construction that this Court has always observed clearly resolves the jurisdictional issue now before the Court.

I. CONGRESS HAS EXPRESSLY GRANTED THE DISTRICT COURT JURISDICTION

Two statutory grants of jurisdiction expressly give the district court authority to review the legality of petitioners' detentions: 28 U.S.C. § 1331, which establishes jurisdiction to hear cases involving substantial questions of federal law, and 28 U.S.C. § 2241, which establishes jurisdiction to consider allegations of detention in violation of the Constitution, laws, or treaties of the United States.

A. The District Court Had Jurisdiction Under 28 U.S.C. § 1331

In 28 U.S.C. § 1331, Congress granted the federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." As this Court has explained, section 1331 confers jurisdiction to hear cases in which "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[12] Nothing in the language or history of section 1331 suggests that the

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[12] *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 28 (1983).

federal courts lack jurisdiction to consider federal questions raised by aliens detained abroad.[13]

Petitioners' complaint plainly falls within that broad grant of jurisdiction because it alleges violations of the Constitution, federal regulations, the Military Order, and treaties of the United States, thus raising substantial federal questions. Specifically, petitioners allege that the government is violating fundamental principles of due process by imprisoning them indefinitely without charge, access to counsel, or access to any impartial process for reviewing their detentions.[14] The complaint also alleges that the government's detention of petitioners violates government regulations that require the government to provide petitioners access to a "competent tribunal" to assess their status,[15] and further alleges violation of the Military Order, under which non-citizens may be detained as part of the war on terrorism only if the President (or someone delegated that task by him) makes a determination in writing that there is reason to believe each of the

[13] The court of appeals held that federal courts lack jurisdiction because foreigners abroad have no cognizable legal rights. Pet. App. 14. Even if that conclusion could be supported, however, it would not affect the *jurisdiction* of the district court to hear petitioners' claims. It is "firmly established" that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). This is not a case in which jurisdiction may be found lacking on the ground that petitioners' claims are "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974). This Court has never ruled that foreigners subjected to indeterminate executive detention without process—inside or outside the territorial United States—have no cognizable rights.

[14] *See Gerstein v. Pugh*, 420 U.S. 103, 117-18 (1975); *Jackson v. Indiana*, 406 U.S. 715, 737-39 (1972); *Addington v. Texas*, 441 U.S. 418, 425-27 (1979); *Zavydas v. Davis*, 533 U.S. 678, 690 (2001).

[15] *See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, U.S. Army Regulation 190-8, Chapter 1-5, para. A., Pet. App. 80-81.

detainees is associated with al Qaida or supported acts of terrorism.[16] Finally, the complaint alleges that petitioners' detention violates customary international law and several treaties of the United States.[17]

In many respects, this is a routine APA case in which the federal courts have jurisdiction under section 1331. Plaintiffs allege that the defendants, all of whom are federal officials, have violated a wide range of statutory, regulatory, and constitutional provisions, precisely the kind of APA case that the federal courts handle every day. To be sure, the merits of these claims are hardly routine, but the lower courts here never reached the merits. Instead, they simply ruled that the federal courts are closed to all of these APA claims, despite the clear grant of subject matter jurisdiction over federal claims in section 1331.

B. The District Court Had Jurisdiction Under 28 U.S.C. § 2241

In 28 U.S.C. § 2241, Congress granted the federal district courts authority to consider the legality of detention of any person imprisoned "under or by color of the authority of the United States" or who is alleged to be held "in custody in violation of the Constitution or laws or treaties of the United States." Petitioners are persons imprisoned by the United States, and they allege that their continuing subjection to custody without process violates the Constitution, laws, and treaties of the United States. Petitioners' claims clearly come within the terms of the habeas statute, and the court of appeals was "not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law."[18]

[16] Military Order, Section 2.

[17] *See infra* Section IV.

[18] *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869).

In construing the reach of habeas jurisdiction, "[i]t must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."[19] Allegations of arbitrary detention, like those asserted by petitioners, occupy the heartland of habeas corpus jurisdiction. As Alexander Hamilton explained in Federalist No. 84, "the practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instruments of tyranny," and habeas corpus is the "remedy for this fatal evil."[20] The grant of habeas jurisdiction must be construed broadly in order to protect the fundamental role played by the writ of habeas corpus in securing liberty.[21] This Court has never failed to accord that jurisdiction a scope appropriate to the writ's "grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[22]

The Court has held that, in the absence of a congressional suspension of the writ, habeas remains available "at the absolute minimum . . . as it existed in 1789."[23] This Court has recognized that habeas jurisdiction historically has been "available to non-enemy aliens as well as to

[19] *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

[20] *See also INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest."); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., joined by Blackmun and Rehnquist, JJ., concurring); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.).

[21] *See, e.g., Lonchar v. Thomas*, 517 U.S. 314, 324 (1996); *O'Neal v. McAninch*, 513 U.S. 432, 442 (1995); *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *Ex parte Siebold*, 100 U.S. 371, 377 (1879); *Yerger*, 75 U.S. (8 Wall.) at 102 (declaring that the fundamental importance of habeas corpus jurisdiction "forbid[s] any construction giving to doubtful words the effect of withholding or abridging this jurisdiction").

[22] *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

[23] *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)).

citizens."[24] Habeas jurisdiction was uniformly exercised by the English courts prior to 1789 to review claims by non-enemy aliens and persons detained abroad.[25]

Because it was solidly established at the time the Constitution was adopted that habeas jurisdiction authorized review of executive detention of non-enemy aliens, regardless where they were detained, denial of jurisdiction would be appropriate only if the government could show that Congress has repealed that jurisdiction. This the government has not and cannot show.

II. THE STATUTORY GRANTS OF JURISDICTION MUST BE CONSTRUED IN LIGHT OF LONG-HELD CANONS OF CONSTRUCTION

The denial of jurisdiction over petitioners' claims conflicts with three long-established canons of statutory construction, all of which support the district court's authority to hear petitioners' claims: (1) the strong presumption that jurisdiction should be construed to allow judicial review of executive action; (2) the canon against construing statutes in a manner that raises substantial constitutional questions; and (3) the canon against construing statutes in a manner inconsistent with the law of nations.

[24] *Id.*

[25] At least as early as 1669, the English central courts were issuing the writ into dominions beyond the realm, *see, e.g., R. v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (the Isle of Jersey); Sir Matthew Hale, THE HISTORY OF THE COMMON LAW OF ENGLAND 120 (1755). The local courts also issued the writ in areas where the Crown had sufficient authority to enforce its command without respect to whether it claimed technical sovereignty over the region. *See* Nasser Hussain, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 10 (2003); Henry Herbert Dodwell, 4 THE CAMBRIDGE HISTORY OF THE BRITISH EMPIRE 592-95 (1929). For a detailed discussion of the English history and practice, see the briefs *amicus curiae* of American and British Legal Historians and the Commonwealth Lawyers Association.

A. The Denial of Jurisdiction Conflicts with the Strong Presumption that Executive Action Is Subject to Judicial Review

In holding that federal courts lack authority to review petitioners' claims, the court of appeals ignored the "strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear and unambiguous statement of congressional intent to repeal habeas jurisdiction."[26] The presumption of reviewability applies with special force in a case like the present in which petitioners assert that the executive has denied fundamental principles of liberty and due process because, as this Court recognized long ago, judicial review protects the "[t]he very essence of civil liberty [which] certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[27] Although the government claims to possess unlimited and unreviewable authority to detain and interrogate petitioners, judicial review ensures that "[n]o man in this country is so high that he is above the law."[28] The presumption that executive action is subject to judicial review also has clear application because petitioners have invoked the judicial review provision of the APA, which codified the presumption of judicial reviewability of executive action.

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[26] *St. Cyr*, 533 U.S. at 298; *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) ("[A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 498 (1991); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974); *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835).

[27] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

[28] *United States v. Lee*, 106 U.S. 196, 220 (1882); *see also Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (stating that the denial of judicial review "would in effect be [a] blank check[] drawn to the credit of some administrative officer or board").

1. The Presumption of Judicial Review Embodies a Longstanding Commitment to the Rule of Law

The presumption that executive action is subject to judicial review embodies our legal tradition's longstanding commitment to the rule of law.[29] Almost 800 years ago, the Magna Carta established that no one may be imprisoned except in accordance with processes administered by an independent tribunal.[30] In the centuries thereafter, English law developed the writ of habeas corpus to ensure that persons imprisoned by the executive have recourse to the courts to review the legality of their detention. Building on this foundation, the United States Constitution protects the rule of law through the establishment of an independent judiciary with authority to check the excesses of executive action. As this Court declared: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[31]

In asking this Court to rule that it may detain prisoners indefinitely without any recourse to judicial review, the

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[29] *See* Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 469 (2003) ("Someone must be guarding the guardians, or else ultimately there is nothing but the rule of men."); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1313 (2001) (contrasting the rule of law with the rule of men, which "connotes unrestrained and potentially arbitrary personal rule by an unconstrained and perhaps unpredictable ruler"); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 9 (1997) (defining as one of the essential elements of the rule of law that "[c]ourts should be available to enforce the rule and should employ impartial procedures.").

[30] MAGNA CARTA, cl. 39 (1215) ("No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.").

[31] *Marbury*, 5 U.S. (1 Cranch) at 163; *see also Romer v. Evans*, 517 U.S. 620, 633 (1996).

government asks this Court to ignore the basis upon which the presumption of judicial review was established. This Court's commitment to the rule of law, however, as embodied by the availability of judicial review, has never faltered. That commitment has long ensured that "[a]ll officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."[32] This Court has long held that the judiciary cannot shirk its duty regardless whether the executive's purposes appear benign,[33] regardless whether the challenged government actions were undertaken to protect national security,[34] and regardless whether the actions were undertaken in times of war or peace.[35]

The government cannot meet the "heavy burden of overcoming the strong presumption" in favor of judicial review.[36] It is the government that bears the burden because "[j]udicial review of such administrative action is the rule, and nonreviewability an exception which must be

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[32] *Lee*, 106 U.S. at 220.

[33] *See Olmstead v. United States*, 277 U.S. 438, 479 (1925) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent ... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.").

[34] *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (rejecting the government's argument that concerns of national security justified restraint on the publication of the Pentagon Papers); *Parisi v. Davidson*, 405 U.S. 34, 49 (1972) ("One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.").

[35] *See Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.").

[36] *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

demonstrated."[37] In order to establish that judicial review is unavailable, the government must provide "persuasive reason to believe that such was the purpose of Congress."[38] The government has pointed to no authority, however, to suggest that Congress intended to foreclose judicial review of petitioners' claims.

2. APA Section 702 Codifies the Presumption of Judicial Review of Executive Action

The APA, invoked by petitioners to establish their right to judicial review, embodies "the strong presumption that Congress intends judicial review of administrative action."[39] In enacting the APA, Congress made clear that the right to judicial review extends to nonresident aliens like petitioners. APA Section 702 establishes that judicial review is available to any "person suffering legal wrong because of agency action."[40] The federal courts have uniformly held that nonresident aliens are entitled to judicial review under the APA: "A person may be just as 'affected or aggrieved' by agency action if he is a nonresident and absent from the country as he would be if he were a resident and present."[41] That conclusion is confirmed by

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[37] *Barlow v. Collins*, 397 U.S. 159, 166 (1970).

[38] *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995); *see also Bowen*, 476 U.S. at 671; *Yerger*, 75 U.S. (8 Wall.) at 102.

[39] *Bowen*, 476 U.S. at 670; *see also Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) ("[W]e have read the APA as embodying a basic presumption of judicial review."); *Abbott Labs.*, 387 U.S. at 140; *Califano v. Sanders*, 430 U.S. 99, 104 (1977) (the APA "undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.").

[40] 5 U.S.C. § 702. The APA defines "person" broadly as "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2).

[41] *Estrada v. Ahrens*, 296 F.2d 690, 695 (5th Cir. 1961); *see also Constructores Civiles de CentroAmerica, S.A. v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972); *cf. Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights.").

the legislative history of the APA. When Congress amended the APA to create the Privacy Act, it employed the narrower term "individual" rather than "person," defining the former as "a citizen of the United States or an alien lawfully admitted for permanent residence."[42] By its use of the term "individual," defined to exclude nonresident aliens, Congress demonstrated its understanding that the right to judicial review available to "persons" under the APA extends to nonresident aliens.[43]

Petitioners' invocation of judicial review under the APA is further supported by the APA exceptions to judicial review for military action "exercised in the field in time of war," and military action in "occupied territory."[44] Those exceptions demonstrate that Congress did not intend to exempt from judicial review all actions undertaken by the armed forces outside the United States. Instead, Congress created exceptions for military action applicable in specific and narrowly drawn geographic areas—"in the field in time of war" and in "occupied territory." That Congress intended the exemption for military actions "in the field in time of war" and in "occupied territory" to apply narrowly is shown by the contrast with the broad exemption from

[42] 5 U.S.C. § 552a(2).

[43] *See, e.g., Raven v. Panama Canal Co.*, 583 F.2d 169, 170-71 (5th Cir. 1978); *Florida Med. Ass'n, Inc. v. Dep't of Health, Ed. & Welfare*, 479 F.Supp. 1291, 1307 (M.D. Fla. 1979) ("In choosing the word 'individual' as the object of the Privacy Act's protections, Congress demonstrated its awareness and preference for the narrower scope of that term, rather than the broader scope of the term 'person' to which the FOIA applies.").

[44] 5 U.S.C. § 701(b)(1)(H). Petitioners are not challenging any action taken in "occupied territory" or on the field of battle; Guantanamo is thousands of miles from the battlefields of Afghanistan. Moreover, the decisions petitioners are challenging—the decision denying them access to their families and to counsel and to any impartial tribunal—were all made within the United States. The APA also excepts from judicial review decisions of "military commissions." 5 U.S.C. § 701(b)(1)(F). That exception is consistent with this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), discussed in Section III *infra*.

the requirements of notice-and-comment rulemaking for all "military or foreign affairs function[s]." By broadly exempting *all* military functions from rulemaking, while shielding from judicial review only military actions "in the field" and in "occupied territory," Congress expressed its understanding that extraterritorial military actions in other locations would be subject to judicial review. The exceptions therefore reinforce the presumption of judicial review.[45]

B. The Denial of Jurisdiction Conflicts with the Principle that Federal Statutes Should Be Construed to Avoid Raising Serious Constitutional Problems

This Court has long been guided by the canon of construction that, when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[46]

[45] This Court held in *Gerstein v. Pugh*, 420 U.S. 103 (1975), that habeas is not the exclusive means for challenging the method by which detention has been imposed. *Gerstein* sustained the use of a declaratory judgment action brought by state detainees alleging that their detention without a pretrial hearing violated due process. This Court held that "the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy" because "respondents did not ask for release from state custody" but instead "asked only that the state authorities be ordered to give them a probable cause determination." *Id.* at 107 n.6. Petitioners likewise are not challenging the fact of their confinement and do not seek release. J.A. 19. Instead, as in *Gerstein*, they ask for access to some impartial tribunal to review whether there is *any* cause for their detention. Accordingly, under *Gerstein*, a petition for habeas corpus is not the sole means for petitioners to bring their claims. *See also Haines v. Kerner*, 404 U.S. 519 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971).

[46] *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *see also Harris v. United States*, 536 U.S. 545, 555 (2001); *St. Cyr*, 533 U.S. at 299-300; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988).

Sustaining the government's position that there is a mechanical bar to federal court jurisdiction based on territorial sovereignty would raise constitutional questions of the greatest moment. It would give the executive unrestrained authority to operate an offshore prison outside the law, an institution without precedent in United States history. It would grant executive branch officials, without any authorization from Congress, the power to divest the courts created by Congress of jurisdiction to review executive actions simply by choosing to locate their prisoners offshore. It would grant U.S. government officials the freedom outside our sovereign territory to treat citizens of allied nations without regard to our "traditional notions of fair play and substantial justice."[47] And it would give executive officials the unfettered authority both to imprison foreign nationals and to serve as "the sole judges" of the legality of those detentions.[48] The canon of constitutional avoidance requires this Court to construe the jurisdictional statutes to avoid these grave constitutional problems.

C. The Denial of Jurisdiction Conflicts with the Principle that Federal Law Should Be Construed Consistently with International Law

This Court has long recognized that U.S. law "ought never to be construed to violate the law of nations if any other possible construction remains."[49] As discussed more

[47] *Asahi Metal Indus. Co. v. Super. Ct. of California*, 480 U.S. 102, 113 (1987).

[48] *United States v. U.S. Dist. Ct. for Eastern Dist. of Mich.*, 407 U.S. 297, 299-301 (1972); *see also Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting) ("[T]he military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (determining that there was insufficient evidence to find that petitioners were waging war against the United States).

[49] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* THE FEDERALIST No. 63 (Alexander Hamilton) ("An

(Continued on following page)

fully in Section IV *infra*, barring the courts from exercising jurisdiction—and thereby denying petitioners any impartial review of their detentions—violates the most fundamental and settled principles of substantive international law. Even more than when the United States is acting with respect to its own citizens, the canon that calls for construing U.S. laws consistently with international law has vital importance in this case where the people being detained are citizens of allied nations who would otherwise be entitled to the protections of international law were they not held in the exclusive custody of the United States.

III. THERE IS NO BAR TO JURISDICTION

No enactment by Congress even arguably repeals or restricts the courts' jurisdiction in the circumstances of the present case or licenses the executive to act in Guantanamo without accountability to the Constitution, laws, or treaties of the United States. With no support from Congress, the court of appeals relied almost exclusively on the prior decision of this Court in *Johnson v. Eisentrager* for its conclusion that the federal courts lack jurisdiction.[50] But *Eisentrager* does not foreclose jurisdiction.

A. *Eisentrager* Does Not Control This Case

In *Eisentrager,* this Court held that 21 German civilians who were captured in China and charged there

attention to the judgment of other nations is important to every government for two reasons: . . . it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.").

[50] *See generally Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers. . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.").

with war crimes, tried by duly-constituted military commissions, convicted of the charges, sentenced and, after review, imprisoned in a military prison in Landsberg, Germany, did not have a "right" to post-conviction review by writ of habeas corpus. The court of appeals in the present case held that, under *Eisentrager*, no federal court has *jurisdiction* to consider the claims of petitioners or any other aliens imprisoned outside the sovereign territory of the United States because our "courts are not open to them." Pet. App. 21. *Eisentrager* stands for no such proposition.

First, one cannot fairly read the *Eisentrager* opinion without acknowledging that the single most important fact underlying the Court's decision was the petitioners' status as adjudicated nonresident "enemy" aliens, a fact the Court mentioned more than 20 times. It was largely because "these prisoners were actual enemies, active in the hostile service of an enemy power," with respect to whom "[t]here is no fiction about their enmity," that the Court concluded they had no right to the sort of post-conviction habeas relief they sought. 339 U.S. at 778. The Court in *Eisentrager* did not adjudicate—nor is there any reason to suppose it intended to pass upon—the rights of nonresident aliens who are nationals of countries friendly to the United States and who have never been charged, let alone convicted by a court or military tribunal. Indeed, throughout its painstaking review of the treatment given by the courts to suits brought by citizens and aliens, the Court did not once refer to the situation of nonresident aliens who are nationals of countries friendly to the United States. *See* 339 U.S. at 768-78.[51] It is likely this is

[51] *Eisentrager* recognized that even enemy aliens, if resident in the United States, are entitled to a hearing to determine if they are in fact enemies, because one cannot be certain of their allegiance. *See* 339 U.S. at 778. Certainly, citizens of a friendly nation, such as petitioners, should be entitled to as much.

because it was obvious to the Court at the time *Eisentrager* was decided, as it is today, that nonresident individuals and corporations from countries friendly to the United States bring suit in the courts of the United States every day.

Second, as the petitioners in No. 03-334 have demonstrated, the aliens in *Eisentrager* were in fact afforded a full panoply of due process rights and never contended otherwise. The *Eisentrager* Court did not consider, much less pass upon, the right of a nonresident enemy alien to habeas corpus review of indefinite executive detention ordered without any form of process, in disregard of the most fundamental conceptions of the rule of law. *A fortiori*, the *Eisentrager* Court did not consider, much less pass upon, the right of nonresident nationals of a country friendly to the United States, such as petitioners, to habeas corpus review of detention in which fundamental due process rights are denied.[52]

Third, the *Eisentrager* petitioners' principal claim, according to the Court, was that they had "a right not to be tried at all for an offense against our armed forces." 339 U.S. at 782. The Court found no such right to exist under the Constitution. Its ultimate holding was crystal clear: "We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."

[52] Justice Jackson, the author of the *Eisentrager* opinion, recognized elsewhere that even the most notorious of our enemies are entitled to due process of law: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice." Opening Statement of Robert Jackson, Chief United States Prosecutor, Nuremberg Tribunal, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (delivered Nov. 14, 1945).

Id. at 785. Petitioners here make no such claim of immunity from military trial.

Fourth, the *Eisentrager* petitioners were tried in China and imprisoned in Germany, both foreign countries over whose territory the United States lacked exclusive control or jurisdiction.[53] In contrast, the petitioners here are imprisoned in Guantanamo, over which the United States exercises complete control and jurisdiction. Unlike in *Eisentrager*, there is no possibility here that the exercise of U.S. court jurisdiction will conflict with the laws of any foreign country or the jurisdiction of any foreign court.[54]

In sum, *Eisentrager* holds that (i) enemy aliens who were (ii) granted fundamental due process in trials by duly-constituted military commissions in China, (iii) convicted of war crimes, (iv) sentenced after appeal, (v)

[53] China obviously is a foreign country over which the United States lacked control or jurisdiction at the time of the *Eisentrager* petitioners' trial. The Federal Republic of Germany was established on September 21, 1949, on which date the Military Government of the United States zone in occupied Germany was terminated. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 92D CONG., DOCUMENTS ON GERMANY: 1944-1970, *Statement by the Department of State on the Establishment of the Federal Republic of Germany and the Entry into Force of the Occupation Statute,* at 166 (Comm. Print 1971). Thereafter, all prisoners in the Landsberg Prison, which was in the former United States zone in occupied Germany, came under the joint control of the Allied High Commission, consisting of members from the United States, Great Britain, and France. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 92D CONG., DOCUMENTS ON GERMANY: 1944-1970, *Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, Signed at Washington, April 8, 1949,* at 150 (Comm. Print 1971). Thus, from before November 14, 1949, when this Court granted the writ of *certiorari* in *Eisentrager*, through June 5, 1950, when *Eisentrager* was decided, the *Eisentrager* petitioners were incarcerated in territory that was neither occupied by nor under the control of the United States, and the petitioners were under the joint control of the three members of the Allied High Commission. 339 U.S. at 786.

[54] *See* Section III.C, *infra*.

imprisoned in Germany, and (vi) who claimed that they had a constitutional right not to be tried by the military, were not entitled to post conviction habeas corpus relief. The court of appeals in the present case erred in concluding that *Eisentrager* resolves the very different question of whether petitioners, who are (i) nationals of a country friendly to the United States, (ii) denied fundamental due process for more than two years, (iii) neither convicted of any crime nor even charged with any wrongdoing, (iv) presumed by the courts below to be innocent, (v) imprisoned in Guantanamo, which is under the complete control and jurisdiction of the United States, and (vi) who do not claim they are immune from trial by the military, can have access to the U.S. courts to assert denial of fundamental rights.

B. *Eisentrager* Is Not a "Jurisdictional" Decision in the Sense of Holding that the Courts Lacked Power or Authority to Consider Petitioners' Claims

Beyond ignoring the controlling distinctions between *Eisentrager* and the present case, the court of appeals also erred in concluding that *Eisentrager* deprived the district court of jurisdiction—in the sense of *power* and *authority* —to consider petitioners' claims. The court of appeals read *Eisentrager* to extirpate the power and authority of U.S. courts to entertain all suits by all aliens in the custody of the U.S. military overseas, regardless of their nature and regardless of whether they sound in habeas or other heads of jurisdiction. Pet. App. 20. It broadly proclaimed that "the courts are not open" to such aliens. *Id.* But as demonstrated below, *Eisentrager* stands for no such proposition.

1. *Eisentrager* Was Decided Under 28 U.S.C. § 2243, Not 28 U.S.C. § 2241

This Court held in *Eisentrager* that the petitioners in that case had no "right" to habeas relief within the meaning of 28 U.S.C. § 2243, under which the writ shall be granted "'unless it appears from the application' that the applicants are not entitled to it." 339 U.S. at 767. This

holding, going to the substance of the *Eisentrager* petitioners' claims, was *not* a holding that the courts lacked jurisdiction—in the sense of *power* or *authority*—to decide those claims. Had the Court decided that the district court lacked jurisdiction, it would have decided the case under § 2241, which grants habeas jurisdiction, rather than under § 2243, which establishes the standards for issuing the writ.

The district court in *Eisentrager* decided the case on narrow, jurisdictional grounds. It noted at the outset of its opinion that "[t]he habeas corpus process is authorized to the District Court through the provisions of sections 451 and 452 of the Judicial Code [now codified at 28 U.S.C. § 2241] which provide . . . [that] the district courts within their respective jurisdictions shall have power to grant writs of habeas corpus. . . ." J.A. 141. The district court then cited *Ahrens v. Clark*, 335 U.S. 188 (1948), in which it said "the Supreme Court specifically passed upon the *power* of the district courts to issue writs of habeas corpus in cases in which the petitioners are not physically within the jurisdiction of the court." *Id.* (emphasis added). The district court read *Ahrens* to hold that the phrase "within their respective jurisdictions" in 28 U.S.C. § 2241 limited the power of district courts to consider petitions for the writ of habeas corpus to those filed by persons "confined or restrained within the territorial jurisdictions of the courts." *Id.* Because the *Eisentrager* petitioners were in Germany, the district court concluded that it must "bow[ ]" to *Ahrens* and dismiss their petition for lack of jurisdiction under § 2241. *Id.*

The court of appeals in *Eisentrager* similarly viewed the issue before it to be whether the district court had the power and authority, under 28 U.S.C. § 2241, to entertain the petition for a writ of habeas corpus. *Eisentrager v. Forrestal*, 174 F.2d 961, 962 (D.C. Cir. 1949). The court first concluded that the petitioners had a "right" to habeas review, and then reasoned that they could not be deprived of this right "by an omission in a federal jurisdictional statute." *Id.* at 965. To do so, thought the court of appeals,

would subject 28 U.S.C. § 2241 to invalidity "as constituting a suspension of the writ in violation of [the Suspension Clause]." *Id.* at 967. Therefore, the court of appeals construed 28 U.S.C. § 2241 to grant power and authority to a district court "which has territorial jurisdiction over the officials who have directive power over the immediate jailer" to entertain a petition for the writ of habeas corpus by "a person deprived of his liberty by the act of an official of the United States outside the territorial jurisdiction of any District Court of the United States." *Id.*

This Court, however, did not approach the principal issue in terms of whether the district court had power and authority under 28 U.S.C. § 2241 to entertain the petition.[55] On the contrary, it observed that "[t]he Court of Appeals assumed, *and we do likewise*, that, while prisoners are in immediate physical custody of an officer or officers not parties to the proceeding, respondents named in the petition have lawful authority to effect their release." 339 U.S. at 766-67 (emphasis added). This Court

[55] To be sure, the Court in *Eisentrager* spoke of the "ultimate question" being "one of jurisdiction of civil courts of the United States *vis-à-vis* military authorities in dealing with enemy aliens overseas." 339 U.S. at 937. There are numerous other references to "jurisdiction" and "territorial jurisdiction" throughout the *Eisentrager* opinion—some speaking of the "jurisdiction" of the military tribunals that had convicted the *Eisentrager* petitioners as though it were the reciprocal of the "jurisdiction" of the district court, *see* 339 U.S. at 765, 780, 785-88, a usage that confirms that *Eisentrager* was concerned with the petitioners' entitlement to relief rather than with the power of the habeas courts to adjudicate that right, *see, e.g., Johnson v. Zerbst*, 304 U.S. 458, 465-69 (1938). But despite these varying and ambiguous uses of the term "jurisdiction," it seems evident from the Court's explicit consideration of the merits of the petitioners' claims, *see* 339 U.S. at 782-90, that *Eisentrager* did not hold that the district court lacked "jurisdiction" to entertain the petition as "the term 'jurisdiction' is used today, *i.e.*, to mean 'the courts' statutory or constitutional *power* to adjudicate the case.'" *United States v. Cotton*, 535 U.S. 625, 630 (2002) (quoting *Steel Co.*, 523 U.S. at 89); *see also Steel Co.*, 523 U.S. at 90 ("'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings.'") (quoting *United States v. Vanness*, 85 F.3d 661, 663 (D.C. Cir. 1996)).

framed the "issues of law" presented to it as being whether, in light of the provision in "28 U.S.C. § 2243" that "the writ of *habeas corpus* must be granted 'unless it appears from the application' that the applicants are not entitled to it," the petitioners were entitled to the writ as "a matter of right." *Id.* at 767, 779. After giving the *Eisentrager* petition "the same preliminary hearing as to sufficiency of application that was extended" in prior habeas war crimes cases involving prisoners incarcerated in the United States, and "[a]fter hearing all contentions [petitioners] have seen fit to advance and considering every contention we can base on their application and the holdings below," the Court "arrive[d] at the same conclusion the Court reached in each of those cases, viz.: that no right to the writ of *habeas corpus* appears." *Id.* at 781.

That the Court in *Eisentrager* based its decision upon petitioners' failure to show an entitlement to the writ under 28 U.S.C. § 2243, rather than upon the district court's lack of power or authority to entertain their petitions under 28 U.S.C. § 2241, shows that the court below was plainly wrong in holding that petitioners' claims in this case were not cognizable in federal court, even if they are different from the claims of the *Eisentrager* petitioners and even if they were presented outside the context of habeas corpus. So long as subject matter jurisdiction exists—as it plainly does in the present case, whether under 28 U.S.C. § 2241 or under 28 U.S.C. § 1331—the federal courts have the power and authority to consider petitioners' claims on their merits.

2. In *Eisentrager*, This Court Did Consider the Merits of Petitioners' Claims

Further evidence from *Eisentrager* that the district court has the power and authority to consider petitioners' claims comes from Part IV of that opinion. 339 U.S. at 785-90. Contrary to the court of appeals ruling that, under *Eisentrager*, "the courts are not open" to aliens in U.S. military custody outside the technical sovereignty of the United States, Pet. App. 2, the Court in *Eisentrager* was careful to note that "the doors of our courts have not been summarily closed upon these prisoners," 339 U.S. at 780.

It proceeded to devote six pages of its opinion to a thorough consideration of the merits of their claims. *See* 339 U.S. at 785-90.

First, the *Eisentrager* Court addressed, though it ultimately rejected, the petitioners' claim that the military commission which tried, convicted, and sentenced them, acted *ultra vires* because they were not charged with an offense against the laws of war, and because they were detained in an area (China) in which there were no ongoing hostilities and no American military occupation. 339 U.S. at 785-89. Second, the Court addressed, though again it ultimately rejected, the *Eisentrager* petitioners' claims that the United States had failed to give Germany notice of their trial, as specified in Article 60 of the Geneva Convention of July 27, 1929, and that they were entitled to be tried by the same courts and according to the same procedure as American soldiers, as specified in Article 63 of the Geneva Convention. *Id.* at 789-90.

Faced with this Court's extensive analysis of the merits of the *Eisentrager* petitioners' claims, which undercut a purely jurisdictional approach to the case, the court of appeals in this case was compelled to characterize Part IV of the *Eisentrager* opinion as "extraneous." Pet. App. 15. In support of this characterization, the court of appeals relied upon the *dissenting* opinion in *Eisentrager*, which similarly characterized Part IV as "gratuitous," "wholly irrelevant," and lending "no support whatever" to the Court's perceived holding. *Id.* (quoting 339 U.S. at 792, 794 (Black, J., dissenting)). Moreover, the court of appeals said there was a "ready explanation" for Part IV, namely, that prior to this Court's decision in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), this Court and other federal courts simply "were not always punctilious in treating jurisdiction as an antecedent question to the merits." Pet. App. 16.

Both the court of appeals and the dissent in *Eisentrager* took this mistaken view of Part IV of the majority opinion because they assumed, erroneously, that the Court's holdings in Parts I-III were *jurisdictional* in the sense that the Court believed the district court lacked the

power and authority to consider the petitioners' claim. As we have already demonstrated, however, the Court in *Eisentrager*—which presumably read the dissenting opinion before deciding to retain Part IV in the opinion—did *not* hold that the district court lacked the power and authority to consider the petitioners' claim. Rather, the Court held that the petitioners failed to show their entitlement to the issuance of the writ of habeas corpus as "a matter of right." 339 U.S. at 779.

The Court's discussion of the lack of merit of the *Eisentrager* petitioners' claim was a necessary reinforcement of its conclusion that petitioners failed to show their entitlement to the writ. Far from indicating that courts lack power or authority to consider claims such as those of petitioners in this case, the discussion supports petitioners' contention that the courts have the power and authority to consider such claims.

C. Guantanamo, "For All Practical Purposes, Is American Territory"

Unlike in *Eisentrager*, petitioners here are being held in the exclusive custody of U.S. officials in an area wholly under U.S. jurisdiction and control.

As the United States Navy declares on its internet site, Guantanamo "for all practical purposes, is American territory."[56] Although Cuba retains "ultimate" sovereignty, it has no current sovereignty over Guantanamo. Its laws do not apply and its courts have no jurisdiction. As the Navy web site states, "the United States has for approximately [100] years exercised the essential elements of sovereignty over this territory, without actually owning it."[57] The web site explains that Cuba's "ultimate" sovereignty means "final or eventual" sovereignty: "Cuban

[56] U.S. Navy Website, *supra* note 9. The Navy bills the statements on its site as "unofficial" but posts them for the information of the world, presumably on the assumption that they are accurate and meaningful.

[57] *Id.*

sovereignty is interrupted during the period of our occupancy, since we exercise complete jurisdiction and control, but in case occupation were terminated, the area would revert to the ultimate sovereignty of Cuba."[58] The United States, in other words, currently exercises complete sovereignty over Guantanamo.[59] The government has never disputed that fact.

U.S. courts are understandably reluctant to exercise jurisdiction over activities in foreign territories subject to foreign laws and the jurisdiction of foreign courts.[60] But that is not the case in Guantanamo. There is no possibility of a conflict with foreign laws because only U.S. laws apply, and the United States alone—by the express terms of the lease—has jurisdiction there. A Cuban national wandering onto Guantanamo and committing a crime is subject to the exclusive jurisdiction of U.S. authorities and of the U.S. courts.[61] Even animals there are protected by

[58] *Id.*; *see also* Joseph Lazar, *International Legal Status of Guantanamo Bay*, 62 AM. J. INT'L L. 730, 735, 740 (1968).

[59] U.S. Navy Website, *supra* note 9; *see also* Rear Admiral Robert D. Powers Jr., *Caribbean Leased Bases Jurisdiction*, XV JAG J., No. 8, 163 (Oct.—Nov. 1961). ("If merely ultimate sovereignty is recognized by both parties as remaining in Cuba, then the exercise of present or actual sovereignty must be vested in the United States.")

[60] Avoiding possible conflict with the laws of another country was one of the concerns behind this Court's decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in which the Court refused to invalidate the results of a search conducted by U.S. officials in Mexico undertaken with the authorization of the Mexican authorities. Similarly, U.S. courts may decline to exercise jurisdiction in order to avoid conflicts with foreign law pursuant to principles of international comity, that is "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for Southern Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987).

[61] *See United States v. Lee*, 906 F.2d 117 (4th Cir. 1990). Guantanamo is different in that regard from most U.S. military bases. For example, the leases for the U.S. military bases in Antigua, Bermuda, British Guiana, Jamaica, New Foundland, Saint Lucia and Trinidad are for definite and

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U.S. laws and regulations; and anyone, including any federal official, who violates those laws is subject to U.S. civil and criminal penalties.[62]

Indeed, the government chose Guantanamo as its prison site largely because its control there is exclusive. The government considered locating its prison at a site in a foreign country, but rejected that option because, among other things, although the "[l]itigation risks in U.S. courts would be eliminated . . . the potential for litigation under local or international law could become a factor."[63] Under the lease with Cuba, there is no risk of any kind of foreign adjudication at Guantanamo. There are no other courts to

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limited periods, grant the United States power and authority only to the extent necessary to establish, operate and defend a base within the leased territory and give the United States at most primary and concurrent jurisdiction over foreign nationals committing crimes on the bases. *See* 55 Stat. 1560, 1572, 1590, Department of State publication No. 1726, Executive Agreement Series 235 (1941). The Guantanamo Lease has been most often compared with the U.S. lease for the Panama Canal Zone. *See* Sedgwick Green, *Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 HARV. L. REV. 781, 792 (1955). Unlike the Guantanamo Lease, however, the Canal Zone Lease specifically provided that "the sovereignty of such territory being actually vested in the Republic of Panama. . . . " Convention for the Construction of a Ship Canal to Connect the Waters of the Atlantic Pacific Oceans (Hay-Bunau-Varilla Treaty), art. III, Nov. 18, 1903, U.S.-Panama, 33 Stat. 2234, T.S. 431. Moreover, the rights and authority originally granted to the United States in the Canal Zone were substantially reduced by a later treaty in 1936. *See Green* at 789 an n.58 (referring to the General Treaty of Friendship and Cooperation with Panama, March 2, 1936, 53 Stat. 1807, T.S. no. 945). Nevertheless, there has never been any question that U.S. courts have jurisdiction over claims brought by foreign nationals in the Canal Zone. *See Canal Zone v. Gonzalez*, 607 F.2d 120 (5th Cir. 1979) (alien afforded all process due under Constitution); *Government of Canal Zone v. Scott*, 502 F.2d 566 (5th Cir. 1974).

[62] *See* Endangered Species Act, 16 U.S.C. § 1538; 48 Fed. Reg. 28,460-28,464 (June 22, 1983) (providing that the Endangered Species Act applies on Guantanamo to protect, *inter alia*, Cuban iguanas).

[63] McCallum, *Why GTMO?, supra* note 7.

whom the detainees could turn and no other laws that could protect them.

According to the court of appeals, however, the U.S. courts are also "not open to them." The prisoners at Guantanamo are not entitled to the same protection as a Cuban iguana: federal officials are free to violate federal laws and regulations with respect to those prisoners, and the courts have no jurisdiction to inquire into the legality of the officials' behavior or the humanity of the prisoners' treatment.

The reason, according to the court of appeals, is that the Guantanamo lease does not give the United States technical sovereignty over Guantanamo. The court of appeals held, in effect, that the lease gives the executive branch total power to act in Guantanamo but the judiciary has no authority to review that action. Such a decision, disconnecting the territorial reach of judicial authority from the territorial reach of plenary executive power, encourages manipulation of the judicial process. It would allow executive officials to shield their conduct from judicial examination—not only in Guantanamo, but in the United States as well. That, in fact, is what has happened here. Just as the decision to select Guantanamo was made in the United States, so were the key decisions at issue in this case—the decisions to deny petitioners access to their families and to counsel and to any impartial tribunal to review the bases for their detentions. Allowing government officials acting within the United States to insulate their decisions from court review simply by holding their prisoners at a location which, "in legal theory, is just outside our gates," would deprive the judiciary of its essential role as a check against arbitrary executive action.[64]

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[64] *Shaughnessy*, 345 U.S. at 219 (Jackson, J., dissenting).

IV. DENYING JUDICIAL REVIEW IS CONTRARY TO THE LAW OF CIVILIZED NATIONS

The Court in *Eisentrager* emphasized throughout its opinion that its decision denying habeas relief to convicted enemy aliens overseas was fully consistent with international law.[65] The court of appeals decision in this case, denying petitioners access to any court to review their claims, clearly is not. It is contrary to the most fundamental principles of the rule of law and the law of nations.

For almost 100 years, the United States has been the international leader in efforts to promote adoption of the rule of law around the world. It has championed the rule of law in fighting wars against totalitarian regimes and in seeking to contain and roll back the adoption of totalitarian ideologies. It has publicly rebuked and condemned regimes that fail to adhere to the rule of law.[66] It has fought for the global recognition of the rule of law through advocacy of the adoption of the Geneva Conventions, the Universal Declaration of Human Rights,[67] the International Covenant on Civil and Political Rights ("ICCPR"),[68] and the American Declaration of the Rights and Duties of Man.[69] These international agreements and covenants seek to make universal the principle, first adopted in the

[65] *Eisentrager*, 339 U.S. at 787-91.

[66] *See. e.g.*, United States Department of State Human Rights Reports, Country Report on Iraq (2002), http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm; Country Report on Yemen (2002), http://www.state.gov/g/drl/rls/hrrpt/2002/18293.htm; Country Report on Iran (2002), http://www.state.gov/g/drl/rls/hrrpt/2002/18276.htm.

[67] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

[68] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc A/6316 (1966) at Pet. App. 85.

[69] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L/V/II82 doc. 6 rev. 1 at 17 (1992) at Pet. App. 87.

Magna Carta, that no person may be deprived of liberty without access to an impartial tribunal administered in accordance with law. As these authorities demonstrate, the proposition that a nation may round up aliens and imprison them outside the rule of law and without court review is anathema to the law of civilized nations and to the principles the United States has promoted around the world.

The Geneva Conventions, for example, specifically require that a "competent tribunal" review a detention whenever there is any doubt as to the detainee's status.[70] As the Commentary to Geneva Convention IV makes clear, "Every person in enemy hands must have some status under international law: . . . nobody in enemy hands can be outside the law."[71] The ICCPR similarly guarantees detainees the right to impartial review of their detentions:

> Everyone has a right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. . . .
>
> . . . [E]veryone shall be entitled to a public hearing by a competent and impartial tribunal established by law.[72]

Other treaties and conventions likewise proscribe detention without access to an impartial tribunal.[73]

[70] Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 75 U.N.T.S. 135, at Pet. App. 84.

[71] ICRC, Commentary: Geneva Convention (IV) Relative to the Protection of Civilian Person in Time of War, 51 (Geneva: 1958).

[72] *See* ICCPR, *supra* note 68, Art. 9(1) and 14(1).

[73] *See, e.g.*, Universal Declaration of Human Rights *supra* note 67, Art. 9(1) and 9(4) ("[I]t is essential . . . that human rights should be protected by the rule of law. . . . [N]o one shall be subjected to arbitrary arrest, detention or exile. . . . Everyone is entitled in full equality . . . to [a] hearing by an independent and impartial tribunal"); American

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It is also well established under international law that the right to an impartial tribunal cannot be evaded by imposing detention outside a nation's borders. That has been an established principle in English law, since at least the seventeenth century when Lord Chancellor Edward Hyde was impeached for attempting to prevent prisoners from gaining access to the courts by sending them to "remote islands . . . thereby to prevent them from the benefit of the law."[74] It is also the universal consensus of the international community, as construed by the European Court of Human Rights,[75] the Inter-American Commission on Human Rights,[76] and the United Nations Human Rights Committee.[77] As the European Court of

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Declaration of the Rights and Duties of Man, art. XXV, *supra* note 69 ("Every individual who has been deprived of his liberty has the right to have the legality of this detention ascertained without delay by a court"); the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment ¶ 11.1, G.A. Res. 43/173, annex 43 U.N. GAOR, Supp. No. 49 at 298, U.N. Doc A/43/49 (1988), at Pet. App. 89 ("[A] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.").

[74] Proceedings in Parliament against Edward Earl of Clarendon, Lord High Chancellor of English, for High Treason, and other High Crimes and Misdemeanors, 15 and 19 Charles II A.D. 1663-1667 (1668), 6 State Trials 291 at 330, 396. *See generally* Brief of American and British Legal Historians as *Amici Curiae* and Brief for the Commonwealth Lawyers Association as *Amicus Curiae*.

[75] *See, e.g., Ocalan v. Government of Turkey,* Eur. Ct. H.R. App. No. 46221/99 (Mar. 2003) (concluding that a leader of the Kurdish resistance held in Kenya "was under effective Turkish authority and therefore was brought within the 'jurisdiction' of that state for purposes of" the European Convention of Human Rights); *Loizidou v. Turkey,* 23 Eur. H.R. Rep. 513 (1997) (a "state cannot insulate itself from Convention scrutiny by operating beyond state frontiers.").

[76] *Coard v. United States*, Case 10.951, Inter-Am. C.H.R. 1283, OEA/ser. L./V./II.106 doc 3 rev. (1999).

[77] *See Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52 (June 6, 1979), U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981) (construing the ICCPR and holding that, where an arrest by Uruguay and mistreatment took place outside its borders, Uruguay was responsible for

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Human Rights has declared, "states are bound to secure the said rights and freedoms of all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad."[78]

As these sources attest, it would place the United States outside the established norms of international law should this Court accede to the executive's contention that detaining petitioners outside the territorial sovereignty of the United States insulates the detention from judicial review and deprives the petitioners of all legal recourse.[79] It would also send a dangerous signal to those around the world committed, as the United States has been, to upholding the rule of law, and an even more dangerous signal to those countries whose commitment to the rule of law has been tenuous at best. As one commentator has observed, "When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C. or the State of Washington, or Springfield, Illinois."[80]

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such actions, stating "it would be unconscionable to so interpret the responsibility under the . . . Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory").

[78] *Cyprus v. Turkey,* 4 Eur. H.R. 482 (1982). The Inter-American Commission on Human Rights has similarly declared: "[E]ach American state is obliged to uphold the protected rights of any person subject to its jurisdiction. . . . [T]he inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control." *Coard*, Case 10.951 at 37.

[79] *See* Barak, 116 HARV. L. REV. at 153 ("Even if the terrorist activities occur outside Israel or the terrorists are being detained outside Israel, we recognize our authority to hear the issue.").

[80] Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988); *see also* Claire L'Heureux-Dube, *The*

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V. JUDICIAL REVIEW NEITHER THREATENS NATIONAL SECURITY NOR OPENS THE FLOODGATES TO LITIGATION

The government argues that the judiciary must stand aside and condone the establishment of a prison outside the rule of law, an institution without precedent in American history. But judicial review under our constitutional structure serves as an indispensable check on the power of the executive, particularly in times of crisis, ensuring that our fundamental values will not needlessly be disregarded through the unrestrained zeal of executive officials focused on doing whatever they think is effective to deal with the dangers of the moment.

A. Judicial Review Does Not Threaten National Security

The government appears to believe that federal court review would threaten our national security. To be sure, "no governmental interest is more compelling than the security of the Nation."[81] Because the war power is constitutionally committed to the political branches of government, Congress and the President enjoy a "wide scope for the exercise of judgment and discretion," and the judiciary owes the political branches substantial deference in reviewing the exercise of war power.[82]

The broad discretion bestowed by the Constitution upon Congress and the President in protecting national security, however, is not unlimited, and constitutional and other limitations on governmental action continue to

Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court, 34 TULSA L.J. 15 (1998).

[81] *Haig v. Agee*, 453 U.S. 280, 307 (1981).

[82] *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943); *see also Loving v. United States*, 517 U.S. 748, 768 (1996) ("[I]t would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority.").

operate in wartime.[83] As this Court long ago declared: "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."[84] Individual liberties remain fully protected in wartime because "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."[85] Accordingly, the war power, like all other constitutional powers, cannot be exercised in derogation of other constitutional provisions, and "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit."[86]

Most crucially, here, the wide discretion enjoyed by the executive in protecting national security *does not deprive the courts of jurisdiction* over cases questioning the extent of that discretion. Although the military enjoys broad discretion when it acts within its sphere of authority, that discretion does not deprive the courts of power to

[83] *See United States v. Cohen Grocery Co.*, 255 U.S. 81, 88 (1921) ("[T]he mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth and Sixth Amendments. . . ."); *Korematsu*, 323 U.S. at 233-34 (1944) (Murphy, J., dissenting) ("[I]t is essential that there be definite limits to military discretion . . . Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."); *Bollman*, 24 F. Cas. at 1192 (Cranch, C.J., dissenting).

[84] *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934); *see also Ex parte Milligan*, 71 U.S. 2, 121 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.").

[85] *United States v. Robel*, 389 U.S. 258, 264 (1967).

[86] *Id.* at 263. Rejection of unrestrained military authority is deeply embedded in the American legal tradition. Indeed, one of the chief complaints laid out in the Declaration of Independence was that King George had attempted to render the "military independent of and superior to the civil power."

review such actions, because the questions of "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[87]

In accordance with these traditions, this Court has not hesitated to review executive actions alleged to be contrary to law, notwithstanding invocations of the war power and concerns over national security. The Court has thus held that the war power does not encompass unlimited and unreviewable authority to punish desertion by soldiers on the field of battle;[88] to maintain military production during wartime;[89] to punish acts of sabotage by alien enemies;[90] to seize enemy property;[91] to annex territory seized by military conquest;[92] to impose internments on resident aliens and U.S. citizens;[93] and to impose punishment on military dependents abroad.[94] In upholding judicial jurisdiction to review the merits of those actions, this Court has never accepted the proposition that the courts should be off-limits to challenges to executive action undertaken to protect national security. The current war on terrorism is no different.

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[87] *Sterling v. Constantin*, 287 U.S. 378, 401 (1932). Thus, this Court has long held that "the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield." *Duncan v. Kahanamoku*, 327 U.S. 304, 322-23 (1946) (quoting *Dow v. Johnson*, 100 U.S. 158, 169 (1879)); *see also Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting) ("[T]he military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.").

[88] *Trop v. Dulles*, 356 U.S. 86 (1958).

[89] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[90] *Ex parte Quirin*, 317 U.S. 1 (1942).

[91] *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

[92] *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850).

[93] *Korematsu v. United States*, 323 U.S. 214 (1944).

[94] *Reid v. Covert*, 354 U.S. 1 (1957).

No one disputes that the government must do all that is necessary to protect our nation from terrorism. But the threat of terrorism should not be allowed to compromise our fundamental principles of justice, fairness, and government accountability to the rule of law unless this is necessary. Executive officials "should not be the sole judges" of when those principles must be compromised.[95] The executive's focus is not on protecting personal liberty or preserving our time-honored safeguards against governmental excesses, but on protecting the nation's security and doing everything possible to increase public safety. In focusing on those objectives, the government can be expected to push its powers to the limit, and beyond. Someone impartial must have authority to examine the executive's actions. That is the traditional and essential role of the judiciary.

The experience of other nations facing ongoing threats of terrorism demonstrates that executive action aimed at protecting the nation's safety can be subject to judicial examination consistently with national security. Perhaps more than any other nation, the State of Israel has faced terrorism, both within and outside its territorial sovereignty, but it has never closed its courts to challenges to the legality of national-security measures alleged to infringe fundamental rights. Although the Israel High Court of Justice has ruled that "the court will not take any stance on the manner of conducting the combat,"[96] the court has ruled on various petitions challenging administrative detention of suspected terrorists.[97]

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[95] *United States v. U.S. Dist. Ct. for Eastern Dist. of Mich.*, 407 U.S. at 317.

[96] *Barakeh v. Minister of Defense*, HC 3114/02, 56(3) P.D. 11, 16 (Israel High Ct. of Justice 2002).

[97] *See, e.g., Anonymous v. Minister of Defense*, Cr. A 7048197, 54(1) P.D. 721 (Israel High Ct. of Justice 1997) (challenging administrative detention of suspected terrorists and the conditions of their confinement); *Pub. Comm. Against Torture v. Gov't of Israel*, H.C. 5100/94,

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Last fall, the court struck down an order issued in the midst of a terrorist crisis that allowed suspected terrorists to be detained for up to 30 days without access to an impartial judicial official.[98] As the court emphasized:

> The general rule is one of freedom. Confinement is an exception. . . . There is no authority to detain arbitrarily. . . .
>
> Judicial intervention with regard to detention orders is essential. . . . Judicial review is the line of defense for liberty, and must be preserved beyond all else.
>
> Judicial intervention stands before arbitrariness; it is essential to the principle of rule of law. . . . It guarantees the preservation of the delicate balance between individual liberty and public safety.[99]

The court recognized that "there is room to postpone the beginning of the investigation, and naturally also the judicial intervention until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly."[100] Once that happened, however, access to a judicial official cannot be delayed. The court held that allowing detention for 30 days without access to judicial authority "unlawfully infringes upon the judge's authority, thus infringing upon the detainee's liberty, which the international and Israeli legal frameworks are intended to protect."[101]

The war on terrorism, like all other governmental actions, can be conducted only within the bounds of law.

53(4) P.D. 817, 845 (Israel High Ct. of Justice 1994) (challenging the means by which suspected terrorists may be interrogated).

[98] *Marab v. IDF Commander in the West Bank*, HC 3239/02, slip op. (Israel High Ct. of Justice 2003).

[99] *Id.* at 10, 14.

[100] *Id.* at 18.

[101] *Id.* at 21.

The President of the Israel high court emphasized that judges must not shrink from applying the law in the face of terrorism: "[T]he struggle against terrorism is not conducted outside the law, but within the law, using tools that the law makes available to a democratic state. Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves."[102] Our country, no less than Israel, is committed to the rule of law. Terrorism must not be allowed to destroy that commitment.

B. Allowing Judicial Review Will Not Open the Floodgates to Litigation

Petitioners ask only that the courts ensure that an adequate process be put in place so that their detentions are not arbitrary. They do not contend that an Article III court must itself conduct that process and review the basis for each individual detention. Rather, they contend that some legal process must apply and that the courts must have the authority to ensure that one does. Because petitioners seek a judicial forum to ensure that the government establishes a fair process, rather than to review the validity of particular detentions, acceptance of jurisdiction will not open the floodgates of litigation.[103]

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[102] Barak, 116 HARV. L. REV. at 151. As with Israel, English treatment of suspected terrorists has been subjected to judicial review. *See, e.g., Republic of Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1978) (reviewing the means of interrogation of suspected Irish Republican Army terrorists).

[103] Petitioners' claims are akin to those at issue in *Bowen*, in which private parties sought to challenge the method by which certain Medicare claims were determined rather than to challenge particular claims determinations. This Court concluded that "permitting review only [of] . . . a particular statutory or administrative standard . . . would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case." *Bowen*, 476 U.S. at 680 n.11 (alterations by the Court) (quoting Note, 97 HARV. L. REV. 778, 792 (1984)). Petitioners here challenge the failure of the government to institute a process to determine the legality of their

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In fact, the government's existing regulations, incorporating the requirements of the Geneva Conventions, establish such a process; they require that an impartial panel review the claim of any detainee who asserts an entitlement to treatment as a prisoner of war or as to whom there is any doubt as to his or her status.[104] That process has been applied in each of our recent conflicts, from Vietnam to the current conflict in Iraq. Indeed, in the prior Gulf War, the government held 1,196 individual hearings to assess the status of captured persons. In 886 of those hearings, the individuals detained were found not to be combatants at all, but displaced civilians or refugees. Only 310 were found to be enemy combatants, and all of those were determined to be "privileged" or legal combatants.[105]

At Guantanamo, the government has conducted no individual hearings. It has simply disregarded its regulations. Yet, because the Guantanamo detainees were all taken into custody dressed as civilians, and because many were turned over by bounty hunters, the danger of mistake is at least as great as in the prior Gulf War—as is the need for a process to distinguish and prevent the prolonged and unjustified detention of the innocent. Detaining people without such a process can be justified only for so long as it takes to put a process in place. The executive may conduct that process, as its regulations require, but the judiciary must stand watch. Barring it from doing so authorizes the executive to engage in just the sort of

detentions. The validity of a process could be determined in a single case and would not lead to a flood of litigation.

[104] *See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, U.S. Army Regulation 190-8, Chapter 1-5, para. A (Oct. 1, 1997).

[105] Department of Defense, *Report on the Conduct of the Persian Gulf War, Final Report to Congress* (April 1992), *cited in* DAVID COLE, ENEMY ALIENS at 42 n.69 (New Press 2003).

unrestrained and arbitrary conduct that the framers of our Constitution were intent upon preventing.[106]

The government recently announced that it plans to release over a hundred Guantanamo prisoners, and allow one to see a lawyer.[107] Although the Guantanamo prison has been operating since January 2002, those announcements were not made until shortly after this Court granted certiorari to consider whether it had jurisdiction. It is doubtful they would have been made otherwise. Nothing more clearly demonstrates the need for judicial review than that the threat of it has caused the executive to act. Our framers were correct that absolute power is what is most to be feared; as soon as there is any restraint, or in this case the threat of restraint, its exercise becomes more reasonable.

Judicial review is explicitly authorized by statute; and it is necessary, as our founders believed, to ensure that our fundamental values are not needlessly disregarded through the exercise of unfettered executive authority.

[106] That the bar on jurisdiction might be self-imposed by the judiciary itself "does not make it innocuous. . . . Abdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

[107] *U.S. to Release 140 from Guantanomo; No Timeframe Given for Letting Detainees Go*, WASH. POST, Dec. 1, 2003, at A07; Vanessa Blum, *Tactics Shift in War on Terrorism*, THE LEGAL INTELLIGENCER, Dec. 10, 2003, at 4.

CONCLUSION

The judgment below should be reversed and the case remanded for the appropriate exercise of judicial jurisdiction.

Respectfully submitted,

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
JARED A. GOLDSTEIN
HEATHER LAMBERG KAFELE

SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-508-8000
Facsimile: 202-508-8100
Attorneys for Petitioners

January 14, 2004

Supreme Court, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

(33) (32)

Nos. 03-334 and 03-343

In the Supreme Court of the United States

SHAFIQ RASUL, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

FAWZI KHALID ABDULLAH FAHAD AL ODAH,
ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. KATSAS
Deputy Assistant Attorney General
GREGORY G. GARRE
DAVID B. SALMONS
Assistants to the Solicitor General
DOUGLAS N. LETTER
ROBERT M. LOEB
SHARON SWINGLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM H. TAFT IV
Legal Adviser
Department of State
Washington, D.C. 20520-6419

QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

This case arises in the midst of the global armed conflict in which the United States is currently engaged against the al Qaeda terrorist network and its supporters. At issue is whether U.S. courts have jurisdiction to consider challenges to the detention of aliens who were captured abroad in connection with the ongoing combat operations in Afghanistan and determined to be enemy combatants, and who are being detained by the U.S. military to prevent them from rejoining the conflict and for other military purposes at the U.S. Naval Base at Guantanamo Bay, Cuba. Applying the principles recognized by this Court in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the court of appeals correctly held that U.S. courts lack jurisdiction over such claims.

STATEMENT

1. a. On September 11, 2001, the United States experienced the most deadly and savage foreign attack on civilian lives and property and its commercial and government infrastructure in one day in the Nation's history. Two jumbo commercial airliners loaded with passengers and jet fuel were hijacked by agents of the al Qaeda terrorist network and launched as missiles in the early morning business hours into two of the largest office buildings in the United States in the heart of New York City; another jumbo airliner was hijacked and flown into the heart of the Department of Defense at the Pentagon; and a fourth jumbo airliner was brought down in Pennsylvania due to efforts of passengers, saving another target presumed to be the U.S. Capitol or the White House. Approximately 3000 people were killed, thousands more were injured, hundreds of millions of dollars of property was destroyed, and the U.S. economy was severely damaged.

In response, the President, acting as Commander in Chief, took action to defend the country and to prevent additional attacks. Congress supported the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist [September 11] attacks * * * or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224. Congress also emphasized that the forces responsible for the September 11th attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Ibid.*

The President dispatched the U.S. armed forces to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported it. During the course of those operations, U.S. and coalition forces have removed the Taliban from power, eliminated the "primary

source of support to the terrorists who viciously attacked our Nation on September 11, 2001" and "seriously degraded" al Qaeda's training capability. Office of the White House Press Secretary, *Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate* (Sept. 19, 2003) (<www.whitehouse.gov/news/releases/2003/09/20030919-1.html>). However, "[p]ockets of al Qaeda and Taliban forces remain a threat to United States and coalition forces and to the Afghan government," and "[w]hat is left of both the Taliban and the al Qaeda fighters is being pursued actively and engaged by United States and coalition forces." *Ibid.*

An American-led force of approximately 11,500 soldiers and a NATO-led force of 5000 remain engaged in active combat operations in Afghanistan. Fighting has intensified in recent months, as al Qaeda and Taliban combatants have continued to launch attacks on U.S. troops, foreign aid workers, and Afghan government officials.[1] At the same time, Osama bin Laden, the leader of al Qaeda, has continued to call on al Qaeda and its supporters to continue their terrorist holy war, or jihad, against the United States, and the United States and other nations have been subject to attacks throughout the world. See, *e.g.*, *Tape urges Muslim fight against U.S.* (Feb. 2, 2003) (<www.cnn.com/2003/ALLPOLITICS/02/11/powell.binladen/index.html>); see also *Transcript of Osama Bin Laden Tape Recording* (Feb. 11, 2002) ("[W]e should drag the forces of the enemy into a protracted, weakening, and long fight.").[2]

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[1] See, e.g., *Afghan Attack Follows An Upsurge in Threats: Taliban Role in Question as 12 Are Arrested*, Wash. Post, Feb. 24, 2004, at A12; *Pakistan to Step Up Border Operations With U.S. Help, Army Preparing Major Assault Against Taliban, Al Qaeda*, Wash. Post, Feb. 23, 2004, at A14; *Ambush Kills Four Afghan Aid Workers*, Wash. Post, Feb. 15, 2004, at A24; Barbara Starr, *U.S. eyes spring offensive in Afghanistan: Hunt for bin Laden focuses on eastern Afghanistan* (Jan. 29, 2004) (<www.cnn.com/2004/WORLD/asiapcf/01/28/afghanistan.us/index.html>).

[2] In a recently released audiotape, a voice believed to be that of one of Osama bin Laden's top lieutenants stated that "the situation is not stable

b. U.S. and coalition forces have captured or taken control of thousands of individuals in connection with the ongoing hostilities in Afghanistan. As in virtually every other armed conflict in the Nation's history, the military has determined that many of those individuals should be detained during the conflict as enemy combatants. Such detention serves the vital military objectives of preventing captured combatants from rejoining the conflict and gathering intelligence to further the overall war effort and prevent additional attacks. The military's authority to capture and detain such combatants is both well-established and time-honored. See, *e.g.*, *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313-314 (1946); *Ex parte Quirin*, 317 U.S. 1, 30-31 & n.8 (1942); *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 465-466 (4th Cir. 2003), cert. granted, 124 S. Ct. 981 (2004); 2 L. Oppenheim, *International Law* 368-369 (H. Lauterpacht ed., 7th ed. 1952); William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920).

Individuals taken into U.S. control in connection with the ongoing hostilities undergo a multi-step screening process to determine if their detention is necessary. When an individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, *i.e.*, whether the individual is "part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States." Dep't of Defense, *Fact Sheet: Guantanamo Detainees* (<www.defenselink.mil/news/detainees.

in Afghanistan," and threatened: "Bush, fortify your targets, tighten your defense, intensify your security measures, because the fighting Islamic community—which sent you New York and Washington battalions—has decided to send you one battalion after the other, carrying death and seeking heaven." *Qaeda Tapes Taunt U.S., France* (Feb. 24, 2004) (<www.cbsnews.com/stories/2004/01/04/terror/main591217.shtml>).

html.>) (*Guantanamo Detainees*).[3] Individuals who are not enemy combatants are released by the military.

Individuals who are determined to be enemy combatants are sent to a centralized holding in the area of operations where a military screening team reviews all available information with respect to the detainees, including information derived from interviews of the detainee. That screening team looks at the circumstances of capture, the threat the individual poses, his intelligence value, and with the assistance from other U.S. government officials on the ground, determines whether continued detention is warranted. Detainees whom the U.S. military determines, after conducting this screening process, have a high potential intelligence value or pose a particular threat may be transferred to the U.S. Naval Base at Guantanamo Bay, Cuba. A general officer reviews the screening team's recommendations. Any recommendations for transfer for continued detention at Guantanamo are further reviewed by a Department of Defense review panel. Approximately 10,000 individuals have been screened in Afghanistan and released from U.S. custody. See *Guantanamo Detainees*, *supra*.

c. Only a small fraction of those captured in connection with the current conflict and subjected to this screening process have been designated for detention at Guantanamo. Upon their arrival at Guantanamo, detainees are subject to an additional assessment by military commanders regarding the need for their detention. That assessment is based on information obtained from the field, detainee interviews, and intelligence and law enforcement sources. In addition, there is a thorough process in place for determining whether a de-

[3] Additional information on the military's screening procedures and the Guantanamo detentions is available at Department of Defense, *Detainees at Guantanamo Bay* (<www.defenselink.mil/news/detainees.html>); *Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce* (Feb. 13, 2004) (<www.defenselink.mil/transcripts/2004/tr20040213-0445.html>); *Briefing on Detainee Operations at Guantanamo* (Feb. 13, 2004) (<www.defenselink.mil/transcripts/2004/tr20040213-0443.html>).

tainee may be released or transferred to another government, consistent with the interests of national security. That process includes an initial review by a team of interrogators, analysts, behavioral scientists, and regional experts, and a further round of review by the commander of the Southern Command, who forwards a recommendation to an interagency group composed of representatives from, *inter alia*, the Department of Defense, Department of Justice, and Department of State. The recommendation is then reviewed by the Secretary of Defense or his designee. See *Guantanamo Detainees, supra.*[4]

The military is currently detaining about 650 aliens at Guantanamo. They include direct associates of Osama Bin Laden; al Qaeda operatives with specialized training; bodyguards, recruiters, and intelligence operatives for al Qaeda; and Taliban leaders. The intelligence gathered at Guantanamo has been vital to the ongoing combat operations in Afghanistan and elsewhere around the world, and to efforts to disrupt the al Qaeda terrorist network and prevent additional attacks on the United States and its allies. Among other things, Guantanamo detainees have revealed al Qaeda leadership structures, funding mechanisms, training and selection programs, and potential modes of attack. In addition, detainees have provided a continuous source of information to confirm other intelligence reports concerning unfolding terrorist plots or other developments in the conflict. See *Guantanamo Detainees, supra.*

The President has determined that neither al Qaeda nor Taliban detainees are entitled to prisoner-of-war status

[4] In addition to these existing procedures, the Department of Defense has recently announced that it will, on a going-forward basis, establish administrative review boards to review at least annually the need to detain each enemy combatant. Detainees will be afforded an opportunity to appear before the panel and the detainee's foreign government will be able to submit information to the panel. The panel will make an independent recommendation on whether continued detention is appropriate. See Dep't of Defense, *News Release* (Mar. 3, 2004) (<www.defenselink.mil/releases/2004/nr20040303-0403.html>).

under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. No. 972 (GPW). See *Guantanamo Detainees, supra*; Office of the White House Press Secretary, *Fact Sheet, Status of Detainees at Guantanamo* (Feb. 7, 2002) (<www.whitehouse.gov/news/releases/2002/02/20020207-13.html>); note 18, *infra.* However, the Department of Defense has made clear that it is treating detainees at Guantanamo humanely and providing them with many privileges similar to those accorded to prisoners of war, including three meals a day that meet Muslim dietary laws, specialized medical care, religious worship privileges, means to send and receive mail, and visits from representatives of the International Red Cross. See *Guantanamo Detainees, supra*; C.A. App. 153-154.

The Guantanamo detentions already have been the subject of extensive diplomatic discussions between the Executive and officials of the foreign governments of detainees' home countries. To date, more than 90 detainees have been released (or designated for release) from Guantanamo to foreign governments. See note 25, *infra.* In addition, the President has determined that six detainees are subject to the Military Order of November 13, 2001, making them eligible for prosecution by a military commission for violations of the laws of war. See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (2001). The United States has charged two of those detainees with conspiracy to commit war crimes. See *Guantanamo Detainees Charged With Conspiracy to Commit War Crimes* (Feb. 24, 2004) (<www.dod.mil/news/Feb2004/n02242004_200402246.html>).

d. The Guantanamo Naval Base is located on a natural harbor along the southeast coast of the Republic of Cuba. The United States occupies and operates the base pursuant to a Lease Agreement with Cuba, which was executed in 1903 in the aftermath of the Spanish-American War. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (6 Bevans 1113) (1903 Lease Agreement).

The 1903 Lease Agreement was reaffirmed by a 1934 treaty, which extended the terms of the lease "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations." Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866.

Under the 1903 Lease Agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased area]," and "Cuba consents that during the period of the occupation by the United States of said areas * * * the United States shall exercise complete jurisdiction and control over and within said areas." 1903 Lease Agreement art. III. A supplemental agreement specifies that the United States agrees to pay Cuba an annual sum (at that time, $2000) as long as it "shall occupy and use" Guantanamo under the 1903 Lease Agreement. Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. I, T.S. No. 426 (6 Bevans 1120) (Supplemental Lease). The Supplemental Lease also states that the United States may not permit anyone "to establish or maintain a commercial, industrial or other enterprise" on Guantanamo and establishes other terms and restrictions governing the United States' occupancy of Guantanamo. *Id.* art. III.

2. This litigation involves three actions brought in the District Court for the District of Columbia against the President, Secretary of Defense, and other military commanders on behalf of certain named aliens who were captured overseas in connection with the fighting in Afghanistan and transferred to Guantanamo.

a. On February 19, 2002, the parents of four British and Australian nationals at Guantanamo filed a next-friend petition for habeas corpus on behalf of those detainees. *Rasul* v. *Bush* (No. 03-334). Petitioners Shafiq Rasul and Asif Iqbal were recently designated for release to the custody of Great Britain (although they remain at Guantanamo pending release). Petitioner David Hicks, an Australian, has been designated by the President under the November 13, 2001 military order. As a result, the Department of Defense may charge Hicks with a violation of the laws of war before a military commission, and Hicks has been permitted to meet with a military counsel, civilian counsel, and a foreign attorney consultant. The amended petition in *Rasul* (J.A. 74-101), *inter alia*, challenges the legality of the aliens' detention, seeks their release, and seeks an order barring interrogations and granting them access to counsel. J.A. 96-98.

b. On May 1, 2002, the family members of 12 Kuwaiti nationals detained at Guantanamo filed *Al Odah* v. *United States* (No. 03-343). Although their complaint (see J.A. 14-35) invokes jurisdiction under, *inter alia*, the habeas statute, the *Al Odah* petitioners declined to style their suit as a habeas petition and instead purport to challenge the legality of the detainees' detention under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, Alien Tort Statute, 28 U.S.C. 1350, and directly under the Fifth Amendment to the Constitution. They seek, *inter alia*, an order declaring that the aliens' detention is arbitrary and unlawful, and providing the detainees with access to counsel. J.A. 34.

c. On June 10, 2002, the wife of another Guantanamo detainee, Mamdouh Habib, filed a petition for habeas corpus on his behalf. *Habib* v. *Bush* (consolidated with *Rasul*, No. 03-334). Habib is an Australian national who was initially taken into custody by Pakistani and Egyptian authorities near the border of Afghanistan, and was transferred to the control of the U.S. military. The habeas petition in *Habib* (see J.A. 106-127), *inter alia*, challenges the legality of Habib's detention, seeks his immediate release, and seeks an order enjoining the military from interrogating Habib and granting him access to counsel. J.A. 121-125.

3. The government moved to dismiss all three actions for lack of subject-matter jurisdiction. As the government explained in its motions to dismiss, under the principles recognized by this Court in *Johnson* v. *Eisentrager*, *supra*, U.S. courts lack jurisdiction over claims filed on behalf of the Guantanamo detainees because they are aliens with no

connection to the United States, and they are being detained outside of the sovereign territory of the United States. The district court agreed that "*Eisentrager*, and its progeny, are controlling" (Pet. App. 48a (citation omitted)), and dismissed for lack of jurisdiction. *Id.* at 32a-64a.

4. The court of appeals affirmed. Pet. App. 1a-29a. The court concluded that "the detainees [in this case] are in all relevant respects in the same position as the prisoners in *Eisentrager*" and thus held that, under the fundamental principles established by this Court in *Eisentrager*, "the [United States] courts are not open to them." *Id.* at 18a. As the court explained, like the prisoners in *Eisentrager*, the Guantanamo detainees "too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States." *Id.* at 10a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that U.S. courts lack jurisdiction over challenges to the legality of the detention of aliens captured abroad and detained by the U.S. military at the U.S. Naval Base at Guantanamo Bay, Cuba.

I. The fundamental jurisdictional question presented in this case is governed by this Court's decision in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, the Court held that U.S. courts lacked jurisdiction to consider a habeas petition filed on behalf of German nationals who had been seized overseas following the German surrender in World War II, tried by a military commission, and imprisoned at a U.S.-controlled facility in Germany. The Court concluded that neither the federal habeas statutes nor the Constitution conferred such jurisdiction. In addition, the Court emphatically rejected the argument that the Fifth Amendment confers rights on aliens held outside the sovereign territory of the United States. *Id.* at 784.

Subsequent developments have only reinforced *Eisentrager*'s analytical foundation. First, Congress has not amended the habeas statutes to confer the jurisdiction that this Court held was absent in *Eisentrager* and, indeed, did not enact a proposed amendment in the wake of *Eisentrager* that would have explicitly conferred such jurisdiction. Second, this Court has repeatedly reaffirmed *Eisentrager*'s constitutional holding that the Fifth Amendment does not apply to aliens abroad. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990). Third, the U.S. military has detained thousands of aliens abroad in connection with several conflicts since 1950, but the U.S. courts have not entertained any habeas petition filed on such an alien's behalf.

Eisentrager controls the outcome in this case. The Guantanamo detainees, like the detainees in *Eisentrager*, are aliens who were captured overseas in connection with an armed conflict and have no connection to the United States. In addition, the Guantanamo detainees, like the detainees in *Eisentrager*, are being held by the U.S. military outside the sovereign territory of the United States. It is "undisputed" that Guantanamo is not part of the sovereign United States, Pet. App. 55a (district court), and that conclusion is compelled by the express terms of the Lease Agreements between the United States and Cuba and the Executive Branch's definitive construction of those agreements. Accordingly, U.S. courts lack jurisdiction to consider claims filed on behalf of aliens held at Guantanamo.

II. Petitioners' efforts to recast and evade this Court's decision in *Eisentrager* are unavailing. *Eisentrager* is not distinguishable on the ground that the Guantanamo Naval Base is under the control of the United States. *Eisentrager* itself makes clear that sovereignty, not mere control, is the touchstone of its jurisdictional rule. Thus, even though the U.S. military controlled the Landsberg prison in post-war Germany, the *Eisentrager* Court held that the alien prisoners in that facility lacked access to our courts because they were outside the sovereign territory of the United

States. The same is equally true with respect to the Guantanamo detainees.

Nor did the Court's jurisdictional ruling in *Eisentrager* turn on the fact that the prisoners were "enemy" aliens. *Eisentrager* addressed the restrictions on "the privilege of litigation" that apply to "aliens, *whether friendly or enemy*." 339 U.S. at 777-778 (emphasis added). Moreover, this Court has recognized in subsequent cases that *Eisentrager* is a seminal decision defining the rights of *all* aliens abroad, and not just "enemy" aliens. See, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). And, in any event, the detainees in this case —who were captured in connection with the fighting in Afghanistan and who have been determined by the U.S. military to be enemy combatants—plainly qualify as enemy aliens for any relevant purposes.

Petitioners also are mistaken in arguing that *Eisentrager*'s jurisdictional holding is conditioned on a threshold inquiry into the legality of an alien's detention under international law. There is no statutory, precedential, or historical basis for this Court to tie the availability of federal jurisdiction to the merits of a detainee's international law claims. That is especially true where, as here, the claims are based on international agreements—like the Geneva Convention—that, as *Eisentrager* recognized, are not privately enforceable in a court and instead are designed for enforcement through political and diplomatic channels.

III. Deviating from the principles recognized in *Eisentrager* in this case would raise grave constitutional concerns. The Constitution commits to the political branches and, in particular, the President, the responsibility for conducting the Nation's foreign affairs and military operations. Exercising jurisdiction over claims filed on behalf of aliens held at Guantanamo would place the federal courts in the unprecedented position of micro-managing the Executive's handling of captured enemy combatants from a distant combat zone where American troops are still fighting; require U.S. soldiers to divert their attention from the combat operations

overseas; and strike a serious blow to the military's intelligence-gathering operations at Guantanamo. At the same time, recognizing jurisdiction over petitioners' claims would intrude on Congress's ability to delineate the subject-matter jurisdiction of the federal courts.

IV. The Guantanamo detentions are the subject of intense diplomatic, congressional, and public consideration. As this Court observed in *Eisentrager*, a recognition of the established jurisdictional limits of the U.S. courts does not mean that detainees are without rights. Rather, the "responsibility for observance and enforcement" of the rights of aliens held abroad under the law of armed conflict "is upon political and military authorities," 339 U.S. at 789 n.14, not the courts.

ARGUMENT

U.S. COURTS LACK JURISDICTION TO CONSIDER CLAIMS FILED ON BEHALF OF ALIENS CAPTURED ABROAD AND HELD AT GUANTANAMO

As this Court has repeatedly reaffirmed, "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted); see also *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173-180 (1803). In *Eisentrager*, this Court held that neither the federal habeas statutes nor the Constitution itself supplied jurisdiction over claims filed by aliens who were captured and held abroad by the U.S. military. As both the court of appeals and the district court below recognized, *Eisentrager* thus governs the sole question presented in this case.

I. UNDER THE FUNDAMENTAL PRINCIPLES RECOGNIZED IN *EISENTRAGER*, U.S. COURTS LACK JURISDICTION OVER CLAIMS FILED ON BEHALF OF GUANTANAMO DETAINEES

A. In *Eisentrager*, The Court Held That U.S. Courts Lack Jurisdiction Over Suits Filed By Aliens Detained Abroad

1. *Eisentrager* arose from a petition for a writ of habeas corpus filed in the District Court for the District of Columbia by German nationals who had been seized by U.S. armed forces in China after the German surrender in World War II, tried by military commission, and detained at a prison controlled by the U.S. military in Landsberg, Germany. See 339 U.S. at 765-767. The prisoners alleged that their confinement violated the Fifth Amendment and other provisions of the Constitution, as well as the "laws of the United States and provisions of the Geneva Convention governing the treatment of prisoners of war." *Id.* at 767; see J.A. 136. They asserted jurisdiction under the federal habeas statutes as well as under the Constitution itself. See 49-306, *Johnson* v. *Eisentrager*, Br. for Resp. at 6, 9-13, 27-43.

The district court dismissed the habeas petition for lack of jurisdiction, but the court of appeals reversed. *Eisentrager* v. *Forrestal*, 174 F.2d 961 (D.C. Cir. 1949). The court of appeals reasoned that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *Id.* at 963. The court explained that, in its view, "if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an *omission* in a federal jurisdictional statute," and that, accordingly, jurisdiction exists to entertain a habeas petition filed by such an individual "in some district court by compulsion *of the Constitution itself*." *Id.* at 965, 966 (emphases added). The court rejected the notion that the fact that the prisoners

were aliens, and that they were captured and confined at all times outside the territory of the United States, in any way altered that conclusion. *Ibid.*

2. This Court reversed. In an opinion written by Justice Jackson, the Court held that U.S. courts lacked jurisdiction to consider the habeas petition in *Eisentrager* because the prisoners were aliens who were seized abroad and detained outside the sovereign territory of the United States.

In the first sentence of the Court's decision, the Court framed the basic question before it as "one of jurisdiction of civil courts." *Eisentrager*, 339 U.S. at 765. In the following pages, the Court repeatedly underscored the fundamental jurisdictional nature of its ruling. The Court referred in broad terms to the Judiciary's "power to act" vis-a-vis military authorities with respect to aliens held abroad, *id.* at 771; the standing of such individuals "to maintain any action in the courts of the United States," *id.* at 776; the "standing [of such individuals] to demand access to our courts," *id.* at 777; and the "capacity and standing [of such individuals] to invoke the process of federal courts," *id.* at 790. Similarly, the Court discussed "the privilege of litigation" in U.S. courts and the use of "litigation [as a] weapon" by aliens held by military authorities. *Id.* at 777-779.

In resolving that basic jurisdictional issue, the Court recognized that the federal habeas statutes did not grant jurisdiction over a petition filed on behalf of aliens held abroad. As the Court explained, whereas "Congress has directed our courts to entertain" certain actions on behalf of a citizen "regardless of whether he is within the United States or abroad," 339 U.S. at 769 (quoting 8 U.S.C. 903 (1946)), "[n]othing * * * in our statutes" supports the exercise of jurisdiction over a habeas petition filed on behalf of an alien held abroad. *Id.* at 768. Moreover, the Court continued, "*[a]bsence* of support from legislative or juridical sources" was "implicit" in the manner in which the court of appeals decided the case by reference to "fundamentals" rather than "to statutes." *Ibid.* (quoting *Eisentrager*, 174 F.2d at 963)

(emphasis added). The Court thus focused its analysis on the more "fundamental[]" question whether the Constitution somehow guaranteed jurisdiction over the prisoners' claims in the absence of any statute.[5]

The Court also rejected the court of appeals' conclusion that, "although no statutory jurisdiction * * * is given [in this context]," 339 U.S. at 767, aliens held abroad "are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*," *id.* at 777. The Court emphasized that aliens are accorded rights under the Constitution and federal law only as a consequence of their *presence* within the territory of the United States. See *id.* at 771. Accordingly, the Court explained that the "privilege of litigation" was unavailable to the aliens in *Eisentrager* because they "at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 777-778. The Court also emphasized that, as aliens held abroad, the prisoners in *Eisentrager* had no Fifth Amendment rights to invoke. See *id.* at 781-783.

At the same time, the Court stressed the separation-of-powers problems inherent in any exercise of jurisdiction in this uniquely military context. The Court explained that judicial review of claims filed on behalf of aliens captured by the U.S. military and detained in connection with an armed conflict would directly interfere with the President's authority as Commander in Chief, which "has been deemed,

[5] The *Al Odah* petitioners suggest (at 28-29) that *Eisentrager* held only that jurisdiction was not available under one provision of the federal habeas statutes (28 U.S.C. 2243). That is incorrect. The prisoners in *Eisentrager* specifically argued that jurisdiction was conferred by "[t]he habeas corpus statute (28 U.S.C. §§ 2241-2255)." 49-306 Br. for Resp. at 6 (Summary of Argument); see also *id.* at 9 (arguing that Section 2241 supplied "jurisdiction to entertain the petition for the writ of habeas corpus in the case at bar"). In holding that the courts *lacked* jurisdiction, the Court necessarily rejected the prisoners' argument that Section 2241 *supplied* such jurisdiction.

throughout our history, as essential to war-time security." 339 U.S. at 774. Likewise, the Court observed that "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Id.* at 779.

3. Ultimately, the Court's holding that it lacked jurisdiction rested on two considerations that led the Court to reject the idea that the Constitution itself supplied jurisdiction over the habeas petition at issue. First, the detainees in *Eisentrager* were aliens with no connection to the United States. Second, the detainees were taken into custody overseas and at all times were held outside the sovereign territory of the United States. As explained in Part I.C, *infra*, those same considerations compel the conclusion that U.S. courts lack jurisdiction over claims filed on behalf of aliens captured abroad in connection with the ongoing fighting in Afghanistan and detained at Guantanamo.

B. The Analytical Foundation Of *Eisentrager* Has Only Been Reinforced During The Past Half Century

In at least three key respects, the force of the Court's decision in *Eisentrager* has only grown with time.

1. As explained above, the Court in *Eisentrager* held that "nothing * * * in our statutes" conferred jurisdiction over the habeas petition at issue. 339 U.S. at 768. Congress is presumed to be aware of this Court's decisions. It has legislated in the area of federal habeas jurisdiction on several occasions since 1950. Yet Congress has never amended the habeas statutes to provide the jurisdiction that this Court held was absent in *Eisentrager*. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"); see also *Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993).

At the same time, the current habeas statute is "very much the same" as the statute in effect at the time of *Eisentrager*. Pet. App. 18a; see 49-306 U.S. Br. at 2-3 n.1. Section 2241 of title 28 has been amended only once since 1950. In 1966, Congress added subsection (d), which relates to federal jurisdiction over claims filed on behalf of prisoners detained pursuant to state-court convictions. See 28 U.S.C. 2241 amendments; Act of Sept. 19, 1966, Pub. L. No. 89-590, 80 Stat. 811. Although Congress has narrowed federal habeas jurisdiction since 1950 over certain types of claims, see, *e.g.*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 811, it has never *broadened* habeas jurisdiction to cover the sort of claims at issue in *Eisentrager*.

There was, however, one failed legislative attempt to create such jurisdiction in the immediate aftermath of *Eisentrager*. In February 1951, a bill was introduced in Congress "[p]roviding for the increased jurisdiction of Federal courts in regard to the power to issue writs of habeas corpus in cases where officers of the United States are detaining persons in foreign countries, regardless of their status as citizens." H.R. 2812, 82d Cong., 1st Sess. The bill provided "[t]hat the district court of the United States is given jurisdiction to issue writs of habeas corpus inquiring into the legality of any detention by any officer, agent, or employee of the United States, *irrespective of whether the detention is in the United States or in any other part of the world, and irrespective of whether the person seeking the writ is a citizen or an alien.*" *Ibid.* (emphasis added). The bill was never voted out of committee, much less enacted into law.

Principles of separation of powers and stare decisis strongly counsel against revisiting *Eisentrager* and revising the habeas statutes in a manner that Congress itself considered and rejected. See *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) ("As we reaffirm today, considerations of *stare decisis* have added force in statutory cases because Congress may alter what we have done by amending the statute."); *id.* at 172; accord *Hilton* v. *South Carolina*

Pub. Ry., 502 U.S. 197, 202 (1991) ("Congress has had almost 30 years in which it could have corrected our decision * * * if it disagreed with it, and has chosen not to do so.").

Since *Eisentrager*, this Court also has repeatedly emphasized its reluctance to presume that Congress intends a federal statute to have extraterritorial application. As the Court observed in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), a case involving a challenge to the United States' treatment of Haitian refugees who were intercepted on the high seas and temporarily detained at Guantanamo, "Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested," and "[t]hat presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility." *Id.* at 188 (citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)). Those decisions bolster the *Eisentrager* Court's refusal to interpret the federal habeas statutes to confer jurisdiction over challenges by aliens held *outside* the United States.

2. During the past 50 years, the Court also has repeatedly reaffirmed the principle that the Fifth Amendment does not apply to aliens abroad. Three Terms ago in *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001), the Court stated that "it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." In support of that proposition, the Court cited *Eisentrager* and *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), with the parenthetical explanation that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States. 533 U.S. at 693.

In *Verdugo-Urquidez*, 494 U.S. at 266, the Court held that the Fourth Amendment does not apply extraterritorially to a search or seizure of property owned by a nonresident alien outside the sovereign territory of the United States. The Court carefully grounded that decision on its precedents

recognizing that the Constitution does not extend "wherever the United States Government exercises its power" and, in particular, does not extend to aliens outside the sovereign territory of the United States. *Id.* at 269; see *id.* at 268-271. In illustrating that principle the Court relied on *Eisentrager*, which, the Court explained, "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Id.* at 269. As the Court stressed, *Eisentrager*'s "rejection of extraterritorial application of the Fifth Amendment was emphatic." *Ibid.*

The Court in *Verdugo-Urquidez* also reaffirmed the practical and separation-of-powers concerns underlying *Eisentrager*. The Court observed that, "[n]ot only are history and case law against [Verdugo-Urquidez], but as pointed out in [*Eisentrager*], the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." 494 U.S. at 273. As the Court explained, "[t]he United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security," and holding that the Constitution applied to aliens abroad "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id.* at 273-274. Any restrictions on the political branches' conduct of such foreign operations, the Court admonished, "must be imposed by the political branches through diplomatic understanding, treaty, or legislation," and not by the courts. *Id.* at 275. See also *DeMore* v. *Kim*, 123 S. Ct. 1708, 1730 (2003) (citing *Eisentrager*).

3. The actions of the U.S. armed forces and courts since *Eisentrager* also have reinforced the basic principles reflected in that decision. In *Eisentrager*, the Court emphasized that there was no historical practice of U.S. courts exercising jurisdiction over the claims of aliens held by the military outside the territory of the United States. See 339 U.S. at 768-777. Since *Eisentrager*, this Nation has engaged

the armed forces in numerous armed conflicts, including in Korea, Vietnam, Iraq, and Bosnia. The military has captured and detained thousands of aliens abroad in connection with those conflicts. Yet, until the Ninth Circuit's divided panel decision in *Gherebi* v. *Bush*, 352 F.3d 1278 (2003) (opinion by Reinhardt, J.), discussed *infra*, no court had ever recognized jurisdiction over a claim filed on behalf of such a detainee.[6]

C. Under Settled Law, U.S. Courts Lack Jurisdiction Over Claims Filed On Behalf Of Aliens Held At Guantanamo

Both the court of appeals (Pet. App. 18a) and the district court (*id.* at 62a) below carefully examined *Eisentrager* and correctly concluded that it applies with full force to the Guantanamo detainees. First, the Guantanamo detainees, like the detainees in *Eisentrager*, are aliens with no connection to the United States. The detainees at issue here are foreign nationals of Australia, Great Britain, and Kuwait. They were concededly captured in Afghanistan or Pakistan, taken into U.S. custody overseas, and were transferred to Guantanamo. See *Al Odah*, No. 03-343 (AO) Br. 2; *Rasul*, No. 03-334 (R.) Br. 3.

Second, the Guantanamo detainees, like the detainees in *Eisentrager*, are being held by the U.S. military outside the sovereign territory of the United States. As the district court stated, "[i]t is undisputed, even by the parties, that Guantanamo Bay is not part of the sovereign territory of the United States." Pet. App. 55a. That conclusion is compelled by the terms of the Lease Agreements pursuant to which the United States occupies Guantanamo, and the Executive Branch's definitive construction of those agreements. As

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[6] In its brief in *Eisentrager*, the government explained that any attempt to exercise habeas jurisdiction over aliens held by the U.S. military in the territory of another country would be inconsistent with the territorial reach of the writ of habeas corpus at common law. See 49-306 U.S. Br. at 33-49. Certainly nothing has changed since *Eisentrager* that would call into doubt the traditional limits on the writ at common law.

discussed above, although Cuba "consents" to permit the United States to "exercise complete jurisdiction and control" of the base, the 1903 Lease Agreement explicitly provides that Cuba retains "ultimate sovereignty" over the naval base. 1903 Lease Agreement art. III, *supra*.

The 1903 Lease Agreement was executed in both English and Spanish, and both authoritative texts confirm Cuba's ongoing sovereignty over Guantanamo Bay. The Spanish phrase in Article III for "ultimate sovereignty" is "soberania definitiva." The word "definitiva" belies petitioner's assertion that "ultimate" as used in Article III means only "eventual." Instead, it is defined in *Diccionario Salamanca* 472 (1996) as "que no admite cambios," or, in English, "not subject to change." Similarly, "ultimate" itself is more naturally defined in this context as "basic, fundamental, original, primitive." *Webster's Third New International Dictionary* 2479 (1993). As this Court explained in *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 88 (1833), "[i]f the English and the Spanish parts [of a treaty] can, without violence, be made to agree, that construction which establishes this conformity ought to prevail." Thus, the terms "definitiva" and "ultimate" are equally understood to affirm Cuba's sovereignty over the leased territory.[7]

Other provisions of the Lease Agreements are consistent with the conclusion that Cuba retained sovereignty over Guantanamo. For example, the 1903 Lease Agreement states that the United States only may exercise jurisdiction and control over Guantanamo "during the *period* of [its] occupation" of Guantanamo. 1903 Lease Agreement art. III (emphasis added). That language is consistent with the understanding that the United States will not *always* occupy Guantanamo.[8] Moreover, the Supplemental Lease imposes conditions on the United States' use of Guantanamo that belie any claim that the United States is *sovereign* over Guantanamo. For example, the Supplemental Lease specifies that the United States may not use Guantanamo for "commercial" or "industrial" purposes. Supplemental Lease, art. III.

As this Court has explained, the "determination of sovereignty over an area is for the legislative and executive departments," and not a question on which a court may second-guess the political branches *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 380 (1948); cf. *Jones* v. *United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."). More generally, the Court has acknowledged that the Framers of our Constitution sought to ensure that the Executive "speak[s] for the Nation with one voice in dealing with other governments." *Crosby* v. *National Foreign Trade Counsel*, 530 U.S. 363, 381 (2000).[9]

In *Gherebi* v. *Bush*, *supra*, a divided panel of the Ninth Circuit held "that, *at least for habeas purposes*, Guantanamo is a part of the sovereign territory of the United States."

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[7] Furthermore, as noted above, the 1903 Lease Agreement states that "the United States recognizes the *continuance* of the ultimate sovereignty of the Republic of Cuba over [Guantanamo]." 1903 Lease Agreement art. III (emphasis added). As Judge Graber explained in *Gherebi*, "the Lease's use of the word 'continuance' denotes the *ongoing* nature of Cuba's 'ultimate sovereignty' over Guantanamo," and bolsters the conclusion that Cuba retained such sovereignty. 352 F.3d at 1307 (emphasis in original).

[8] Indeed, in 1996 Congress declared that it is "[t]he policy of the United States * * * [t]o be prepared to enter into negotiations with a democratically elected government in Cuba either to return the United States Naval Base at Guantanamo to Cuba or to renegotiate the present agreement under mutually agreeable terms." 22 U.S.C. 6061(12).

[9] The Executive Branch opinions cited by petitioners (R. Br. 43) are not to the contrary. Indeed, those opinions, which address issues far afield from the question presented here, specifically recognize that the United States' Lease Agreements with Cuba reserve to Cuba the "ultimate sovereignty" over Guantanamo, 35 Op. Att'y Gen. 536, 537 (1929) (quoting Lease Agreement), and that, under those agreements, Guantanamo thus lies "*outside* the territorial United States," 6 Op. Off. Legal Counsel 236, 238 (1982) (emphasis added).

352 F.3d at 1290 (emphasis added). This Court has never distinguished between sovereignty *for habeas purposes* and sovereignty *for all other purposes*. Moreover, the judicial recognition of even limited sovereignty in contravention of the Executive's position is problematic. As Judge Graber observed in *Gherebi*, "[t]he majority today declares that the United States has sovereignty over territory of a foreign state, over the objections of the executive branch," and despite the fact that "both parties to the Guantanamo Lease and its associated treaties—Cuba and the United States (through the executive branch)—maintain that Guantanamo is part of *Cuba*." *Id.* at 1312. In light of those practical problems and the unambiguous terms of the Lease Agreements, there is no basis for adopting the Ninth Circuit's novel conception of sovereignty.[10]

* * * * *

In short, the same principles on which *Eisentrager* is grounded compel the conclusion that U.S. courts lack

[10] In *Gherebi*, the Ninth Circuit (Judge Reinhardt, joined by Senior District Judge Shadur) held that *Eisentrager* does not apply to the Guantanamo detainees either (1) because the United States exercises sovereignty over Guantanamo "at least for habeas purposes," 352 F.3d at 1290, an argument that fails for the reasons discussed above, and that petitioners themselves have not advanced in this case; or (2) because the United States exercises territorial jurisdiction and control over Guantanamo, an argument that fails for the reasons discussed below (Part II.B, *infra*). Judge Graber dissented in *Gherebi*, concluding that *Eisentrager* was controlling. 352 F.3d at 1305. The other lower courts to have considered the issue have agreed with Judge Graber's view. See Pet. App. 18a (D.C. Circuit); *id.* at 62a (Judge Kollar-Kotelly); *Coalition of Clergy* v. *Bush*, 189 F. Supp. 2d 1036, 1046-1050 (C.D. Cal.) (holding that Guantanamo detainees are similar "[i]n all key respects" to the prisoners in *Eisentrager*), aff'd in part and vacated in part, 310 F.3d 1153, 1164 n.4 (9th Cir. 2002) (observing in dictum "[*Eisentrager*] well matches the extraordinary circumstances" of the Guantanamo detentions), cert. denied, 123 S. Ct. 2073 (2003); *Gherebi* v. *Bush*, 262 F. Supp. 2d 1064, 1066-1067, 1069-1071 (C.D. Cal.) (*Eisentrager* "compels dismissal" of the petition filed on behalf of a Guantanamo detainee), rev'd, 352 F.3d 1278 (9th Cir. 2003).

jurisdiction over claims filed on behalf of aliens captured abroad and detained at Guantanamo.

II. PETITIONERS' ATTEMPTS TO RELITIGATE AND EVADE *EISENTRAGER* ARE UNAVAILING

None of the petitioners in this case has suggested that *Eisentrager* is no longer good law, much less formally requested this Court to revisit the result or reasoning of *Eisentrager*. Instead, petitioners focus their efforts, first, on renewing the central statutory argument made and rejected in *Eisentrager* and, second, on attempting to circumvent *Eisentrager* based on factual distinctions that are of no consequence under *Eisentrager*'s own terms.

A. Petitioners' Overarching Statutory Arguments Cannot Be Reconciled With *Eisentrager*

Petitioners first urge a construction of the habeas statutes that essentially ignores, and in any event cannot be reconciled with, this Court's decision in *Eisentrager*. Petitioners' central submission to this Court is that Congress has "expressly" granted jurisdiction over the claims at issue. AO Br. 13; see *id.* at 17- 25; R. Br. 11-30. In particular, petitioners argue that "[t]he district court had jurisdiction over the petitions for habeas corpus pursuant to 28 U.S.C. § 2241," which "grants the federal courts power to review Executive detentions 'in violation of the Constitution or laws or treaties of the United States.'" R. Br. 7 (quoting 28 U.S.C. 2241(c)(3)); see AO Br. 15-17. That argument was unavailing at the time of *Eisentrager* and, in the wake of *Eisentrager* and the statutory history discussed in Part I.B above, the argument is no more availing today.

The *Eisentrager* Court held that "[n]othing * * * in our statutes" confers jurisdiction over a claim filed on behalf of an alien who "at no relevant time" has been within the sovereign territory of the United States. 339 U.S. at 768. That holding was necessary to the Court's conclusion that it lacked jurisdiction in *Eisentrager*. The current version of Section 2241 is the same in all pertinent respects as the

statute in effect at the time of *Eisentrager*. Pet. App. 18a. Accordingly, Section 2241 cannot confer any jurisdiction today that it did not supply then. That conclusion is only bolstered by the fact that the one bill that was introduced in the wake of *Eisentrager* that *would* have purported to confer the type of habeas jurisdiction that this Court found absent in *Eisentrager* languished in committee. See Part I.B, *supra*.

Petitioners contend that the habeas statute must be read to confer jurisdiction over the claims at issue in this case in order to avoid "serious constitutional problem[s]" under the Fifth Amendment. R. Br. 10 (quoting *Zadvydas*, 533 U.S. at 692); see *id.* at 17; see AO Br. 23-24. That argument, too, cannot be reconciled with *Eisentrager*. As discussed above, this Court rejected the argument that, "although no statutory jurisdiction * * * is given [in this context]," *Eisentrager*, 339 U.S. at 767, aliens held abroad nonetheless "are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*," *id.* at 777. Moreover, to the extent that petitioners argue that the Fifth Amendment should influence the Court's interpretation of the habeas statutes, that argument also was raised and soundly rejected in *Eisentrager*.

The *Eisentrager* Court held that the Fifth Amendment—the provision on which petitioners base their constitutional-avoidance argument—does not apply extraterritorially to aliens held outside the sovereign United States. See 339 U.S. at 781-783. This Court has repeatedly affirmed that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States. *Zadvydas*, 533 U.S. at 693. Those constitutional protections therefore do not extend across the Florida Strait to Cuba, including the sovereign territory of Cuba that the United States occupies at Guantanamo under the terms of its Lease Agreements with Cuba.

The *Rasul* petitioners argue (Br. 21) that holding that U.S. courts lack jurisdiction over habeas petitions filed on behalf of aliens held abroad "would raise grave constitutional

doubts under the Suspension Clause." See U.S. Const. Art. I, § 9, Cl. 2. That argument is refuted by *Eisentrager* as well. One of the principal arguments made in *Eisentrager* was that the Suspension Clause required the courts to exercise jurisdiction (see 49-306 Br. for Resp. at 27-42), and both the court of appeals' decision in *Eisentrager* (see 174 F.2d at 965-966 & n.20) and the opinion of the dissenting Justices in *Eisentrager* (see 339 U.S. at 791 n.1, 798) were premised on that erroneous understanding. The Court in *Eisentrager*, however, rejected the argument that the "prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*." *Id.* at 777.

Nothing in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), on which petitioners rely (R. Br. 21-22; AO Br. 18), is to the contrary. *St. Cyr* holds only that, absent a clear statement from Congress, statutes should be interpreted not to repeal pre-existing habeas corpus jurisdiction in order to avoid raising constitutional problems. See 533 U.S. at 298-303. But there is no constitutional problem to "avoid" here. This Court held in *Eisentrager* that "[n]othing in the text of the Constitution" extends a right to petition for habeas corpus to aliens abroad, "nor does anything in our statutes." *Eisentrager*, 339 U.S. at 768. Giving non-resident aliens a right to habeas corpus far from avoiding any constitutional problems would contravene long-settled precedent. See *id.* at 769, 776-777. Accordingly, *St. Cyr*'s interpretive principles are inapplicable here. See 533 U.S. at 299-303.

The more relevant interpretative principle is this Court's warning in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370 (1959), about the "discovery of new, revolutionary meaning in reading an old judiciary enactment." This Court should reject petitioners' invitation to discover a "revolutionary" new component of federal jurisdiction—the judicial power to review claims filed on behalf of aliens held by the U.S. military abroad in connection with an armed conflict—that not only never has been recognized in the past

but was expressly rejected by this Court more than 50 years ago in *Eisentrager*. 339 U.S. at 768.[11]

B. There Is No Basis For Carving A "Guantanamo Exception" Out Of *Eisentrager*'s Sovereignty-Based Rule

Although they have conceded that Guantanamo is outside the sovereignty territory of the United States, Pet. App. 55a, petitioners nonetheless argue that *Eisentrager* is inapplicable on the ground that Guantanamo is "under U.S. jurisdiction and control." See AO Br. 34; see *id.* 34-38; R. Br. 41-46. The panel majority in *Gherebi* distinguished *Eisentrager* on similar grounds. See 352 F.3d at 1286-1290. For several reasons, the courts below (see Pet. App. 14a-17a; *id.* at 55a-63a), as well as Judge Graber in *Gherebi* (see 352 F.3d at 1305-1306), correctly rejected that argument.

1. To begin with, petitioners' argument cannot be squared with *Eisentrager*'s own terms. As discussed above, *Eisentrager* makes clear that its jurisdictional holding is based on sovereignty, and not on malleable concepts like de

[11] The *Al Odah* petitioners also suggest that the federal question statute (28 U.S.C. 1331) supplies the jurisdiction that this Court held was absent in *Eisentrager*, suggesting that "this is a routine APA case in which the federal courts have jurisdiction under section 1331." See AO Br. 13-15. That argument fails. In *Eisentrager*, the Court stated in broad terms that "[n]othing * * * in our statutes" confers jurisdiction over a claim filed on behalf of an alien who "at no relevant time" has been within the sovereign territory of the United States. 339 U.S. at 768. It is unimaginable that the Court that reached that fundamental conclusion in *Eisentrager* would have permitted the same prisoners to invoke the jurisdiction of the U.S. courts if they had simply asserted jurisdiction under the federal question statute (which has been in effect since 1875). Furthermore, giving effect to petitioners' reading of Section 1331 would mean that U.S. courts would have jurisdiction to entertain a lawsuit filed by an alien anywhere in the world, including on the battlefield in Afghanistan, as long as the action challenges a violation of federal law. Jurisdictional statutes are subject to the same presumption against extraterritoriality as other statutes. There is no indication in the text or history of Section 1331 that Congress intended it to apply extraterritorially, and any such application would raise serious constitutional concerns in cases, such as this one, that challenge the Executive's conduct of foreign affairs.

facto control. See Pet. App. 16a; *id.* at 55a; *Gherebi*, 352 F.3d at 1305 ("A straightforward reading of [*Eisentrager*] makes it clear that 'sovereignty' is the touchstone * * * for the exercise of federal courts' jurisdiction.") (Graber, J., dissenting). In particular, in explaining why "the privilege of litigation" did not extend to the aliens in *Eisentrager*, the Court stated that the "prisoners at no relevant time were within any *territory over which the United States is sovereign*." 339 U.S. at 777-778 (emphasis added).

The *Eisentrager* Court's treatment of *Ex parte Quirin*, 317 U.S. 1 (1942), and *In re Yamashita*, 327 U.S. 1 (1946), underscores that sovereignty, not merely jurisdiction or control, is the key, and that petitioners' efforts to rely on cases like *Quirin* and *Yamashita* are misguided. In *Quirin* and *Yamashita*, the Court exercised jurisdiction over habeas petitions of enemy aliens (and, in *Quirin*, an enemy combatant who was presumed to be a U.S. citizen). The *Eisentrager* Court, however, distinguished those cases on the ground that the aliens were captured and detained *within* U.S. territory. As the Court noted, *Quirin* was brought by aliens who were apprehended "in the United States." 339 U.S. at 780. Similarly, the habeas petition in *Yamashita* was brought by an alien who was captured and detained in the Philippine Islands—then an insular possession of the United States. As the Court explained, "[b]y reason of our *sovereignty* at that time over these insular possessions, Yamashita stood much as did Quirin before American courts"—*i.e.*, he was "within territory of the United States." *Ibid.* (emphasis added). The dissenters in *Eisentrager* likewise understood that sovereignty was the key to the Court's distinction of *Quirin* and *Yamashita*. See *id.* at 795 ("Since the Court expressly disavows conflict with the *Quirin* and *Yamashita* decisions, it must be relying not on the status of these petitioners as alien enemy belligerents but rather on the fact that they were captured, tried and imprisoned outside our territory."). *Eisentrager*'s treatment of *Quirin* and *Yamashita* thus reaffirms that the key to the Court's

decision was the prisoners' status as aliens outside U.S. sovereign territory, and demonstrates that petitioners' efforts to rely on *Quirin* and *Yamashita* (and habeas petitions filed by citizens) are misguided. See R. Br. 15-16.

2. Similarly, if U.S. jurisdiction or control over foreign territory, and not sovereignty, were the benchmark, then the prisoners in *Eisentrager* themselves would have been entitled to judicial review of their habeas claims. The Landsberg prison in Germany was unmistakably under the control of the United States when Eisentrager was held there. Indeed, it is hard to imagine that the United States would ever detain military prisoners in a facility over which it *lacked* control. The Court in *Eisentrager* noted that the prisoners at issue in *Eisentrager* were under the custody of the "American Army officer" who was the "Commandant of Landsberg Prison" and it referred to the hundreds of cases —like *Eisentrager*—involving "aliens confined by *American* military authorities abroad." 339 U.S. at 766, 768 n.1 (emphasis added). Justice Black was even more direct in his dissenting opinion, stating that "[w]e control that part of Germany we occupy." *Id.* at 797. The United States controls Guantanamo subject to the terms and conditions of its Lease Agreements with Cuba, but—as this Court made clear in *Eisentrager*—in the absence of *sovereignty*, the exercise of such control does not entitle the aliens held at Guantanamo to the privilege of litigating in U.S. courts.[12]

[12] The conclusion that the United States exercised control over the Landsberg military prison is further demonstrated by the instruments governing the allied occupation of Germany. Paragraph 2(i) of the Occupation Statute (C.A. App. 332) explicitly reserved "[c]ontrol" over the "German prisons" to the occupying powers. And the United States, through the U.S. High Commissioner for Germany, exercised exclusive control as an occupying force over the American zone in Germany, including the Landsberg prison. See Staff of the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess., *Documents on Germany, 1944-1970*, at 165 (Comm. Print 1971) (Charter of the Allied (Western) High Commission for Germany, para. 3, signed by the Foreign Ministers of France, the United Kingdom, and the United States, June 20, 1949).

3. This Court has recognized that leased U.S. military installations abroad are outside the sovereign territory of the United States, even though such facilities are vital to the conduct of the United States' foreign affairs abroad precisely because they provide an area removed from the sovereign territory of the United States, yet indisputably within the control of U.S. armed forces. In *United States* v. *Spelar*, 338 U.S. 217, 219 (1949), the Court held that a U.S. military base leased in Newfoundland was "subject to the sovereignty of another nation," not "to the sovereignty of the United States," and therefore fell within the "foreign country" exception to the Federal Tort Claims Act. The base in *Spelar* was governed by "the same executive agreement and leases" as the U.S. military base in Bermuda. *Id.* at 218. This Court in *Vermilya-Brown* recognized in turn that the United States' rights over the base in Guantanamo are "substantially the same" as its rights over the base in Bermuda. 335 U.S. at 383; see Pet. App. 15a.

4. Petitioners' reliance on the "Insular Cases"—in which the Court has recognized that certain constitutional rights or privileges may extend to inhabitants of American territories or insular possessions—is misplaced. Guantanamo is not a U.S. territory, or even an unincorporated territory like Guam or Puerto Rico. The Constitution gives to Congress the power to recognize and regulate American territories. See U.S. Const. Art. IV, § 3, Cl. 2; *Torres* v. *Puerto Rico*, 442 U.S. 465, 469-470 (1979). Congress has exercised that authority and an entire title of the United States Code (Title 48) is devoted to "Territories and Insular Possessions."[13]

[13] When Congress recognizes U.S. territories, it carefully delineates the rights and privileges that extend to the residents of such territories. See, *e.g.*, 48 U.S.C. 734 ("statutory laws of the United States not locally inapplicable * * * shall have the same force and effect in Puerto Rico as in the United States"); 48 U.S.C. 737 (stating that "rights, privileges, and immunities" of U.S. citizens shall be respected in Puerto Rico "to the same extent as though Puerto Rico were a State of the Union"); 48 U.S.C. 1421b(*l*) ("Bill of rights" governing Guam; includes "privilege of the writ of habeas corpus"); 48 U.S.C. 1561 ("Bill of rights" governing Virgin Islands;

Guantanamo is not addressed in Title 48 because it is not a U.S. territory or insular possession. It is a leased military base on foreign soil, just like numerous other military bases occupied by the United States around the world. See *Spelar*, 338 U.S. at 219; *Vermilya-Brown*, 335 U.S. at 385.

Guantanamo is not comparable to the former Trust Territory of Micronesia. See Pet. App. 16a-17a; 48 U.S.C. 1901 *et seq.* Quite unlike the Trust Territory of Micronesia, the United States occupies Guantanamo pursuant to a lease that explicitly recognizes that Cuba retains sovereignty over Guantanamo. By contrast, no other sovereign authority existed at the time of the appointment of the United States as administrator of the Micronesia Trust Territory. See Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665. Likewise, the United States' operation of Guantanamo does not share any of the civilian governmental attributes of its special role with respect to the Trust Territory in Micronesia, and responsibility to "nurture the Trust Territory toward self-government." *Gale* v. *Andrus*, 643 F.2d 826, 830 (D.C. Cir. 1980); see 48 U.S.C. 1681(a).[14]

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includes "privilege of the writ of habeas corpus"); 48 U.S.C. 1661, 1662, 1662a (recognizing U.S. sovereignty over Tutuila, Manua, eastern Samoa, and Swains Island; stating that amendments to the constitution of American Samoa, as approved by the Secretary of the Interior pursuant to executive order, and which includes privilege of the writ of habeas corpus, may be made only by Act of Congress); 48 U.S.C. 1801 (historical and statutory notes) (approving Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America and incorporating Constitution of the Northern Mariana Islands which includes privilege of writ of habeas corpus). Congress has not enacted any such legislation with respect to Guantanamo.

[14] See, *e.g.*, Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986) (establishing the Northern Mariana Islands as U.S. territory); J. Res. of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America); Act of Nov. 8, 1977, Pub. L. No. 95-157, 91 Stat. 1265 (establishing a U.S. District Court in the Northern Mariana Islands).

Nor is Guantanamo comparable to the Panama Canal Zone, which, until the United States withdrew from the Zone, was viewed as an unincorporated territory of the United States and was the subject of extensive legislation. See 48 U.S.C. 1301 *et seq.* (1946). The Fifth Circuit held that Congress had extended some constitutional rights to the Panama Canal Zone, but the exercise of jurisdiction in those cases was based on the fact that Congress had established a U.S. federal district court of the Canal Zone with appellate review by the Fifth Circuit. See 22 U.S.C. 3841(a) (repealed).[15] Obviously there is no analogous district court with jurisdiction over Guantanamo, nor has Guantanamo ever been treated as an unincorporated territory of the United States. Moreover, as Judge Graber explained in *Gherebi*, the differences between the language of the Guantanamo Lease Agreements and the Panama Canal Treaty if anything only bolster the conclusion that *Cuba* retained sovereignty over Guantanamo. 352 F.3d at 1311 (dissenting).[16]

5. When the United States is occupying a foreign land for general military purposes, the Court has held that the occupied area remains foreign soil and "cannot be regarded, in any constitutional, legal, or international sense, a part of the territory of the United States." *Neely* v. *Henkel*, 180 U.S. 109, 119 (1901). In *Neely*, this Court considered the military's occupation and control of Cuba following the

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[15] See *United States* v. *Husband R. (Roach)*, 453 F.2d 1054, 1057 (5th Cir. 1971), cert. denied, 406 U.S. 935 (1972); *Government of the Canal Zone* v. *Scott*, 502 F.2d 566, 568, 570 (5th Cir. 1974); *Government of the Canal Zone* v. *Yanez P. (Pinto)*, 590 F.2d 1344, 1351 (5th Cir. 1979).

[16] Petitioners cite *United States* v. *Lee*, 906 F.2d 117 (4th Cir. 1990) (per curiam), for the proposition that crimes committed at Guantanamo may be prosecuted in the U.S. courts. But petitioners overlook that the court in *Lee* exercised jurisdiction over an indictment pursuant to 18 U.S.C. 7 (1988), which extended the criminal law extraterritorially to "crimes committed *outside* the jurisdiction of a state or district court." 906 F.2d at 117 n.1 (emphasis added). That certain laws may apply *extra*-territorially to Guantanamo only reinforces the conclusion that the base lies outside the United States. See Pet. App. 14a.

Spanish-American War—the war that led to the current Guantanamo lease arrangement. When *Neely* arose, "the Island of Cuba was 'occupied by' and was 'under the control of the United States.'" *Id.* at 115. Moreover, the treaty pursuant to which the United States occupied Cuba did not place a limit on the term of such occupancy. *Id.* at 116 (quoting treaty provisions). But this Court nonetheless held that Cuba was "a *foreign* country or territory," *id.* at 115 (emphasis in original), and not, "in any * * * sense, a part of the territory of the United States," *id.* at 119.

If the island of Cuba was not U.S. territory when the United States occupied and controlled it after the Spanish-American War, then *a fortiori* Cuba (including Guantanamo) is not U.S. territory today. That conclusion is underscored by the terms pursuant to which the United States *leases* Guantanamo from Cuba, which place the United States in an inferior position at Guantanamo than the one that it occupied with respect to Cuba at the time of *Neely*. See also *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 614-615 (1850).

C. The Reasoning Of *Eisentrager* Is Not Limited To Aliens Who Are Acknowledged "Enemy" Aliens

1. Petitioners argue that *Eisentrager* is inapplicable on the ground that the detainees in this case are not "enemy" aliens. See AO Br. 26-27. The courts below correctly rejected that argument. Pet. App. 6a-13a; see *id.* at 51a-55a. Although the *Eisentrager* Court referred to the prisoners as "enemy aliens," its holding did not depend on the aliens' status as "enemies." Rather, as explained above, the key to *Eisentrager*'s constitutional analysis was the fact that the aliens had no connection at any time to the sovereign territory of the United States. *Id.* at 11a.

The *Eisentrager* Court emphasized that "the privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in the country implied protection." 339 U.S. at 777-778 (emphasis added). The dissenters in *Eisentrager* likewise recognized that the Court's decision "inescapably" applied to "any alien

who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared." *Id.* at 796 (Black, J., dissenting). And, as discussed above, that reading of *Eisentrager* is confirmed by this Court's subsequent precedents. See, *e.g.*, *Demore*, 123 S. Ct. at 1730; *Zadvydas*, 533 U.S. at 693; *Verdugo-Urquidez*, 494 U.S. at 269; Part I.B, *supra*.

2. In any event, the Guantanamo detainees qualify as "enemy" aliens for purposes of *Eisentrager* because they were seized in the course of active and ongoing hostilities against United States and coalition forces, and determined by the U.S. military to be enemy combatants. Cf. *United States* v. *Terry*, 36 C.M.R. 756, 761 (A.B.R. 1965) ("The term 'enemy' applies to any forces engaged in combat against our own forces."), aff'd, 36 C.M.R. 348 (C.M.A. 1966). Nothing in *Eisentrager* suggests that an "enemy" alien is limited to a national of a country that has formally declared war on the United States. Although *Eisentrager* noted that under international law all nationals of a belligerent nation become "enemies" of the other upon a declaration of war, see 339 U.S. at 769-773 & n.2, the Court stressed that it did not need to rely on that "fiction" because the detainees were "actual enemies, active in the hostile service of an enemy power." *Id.* at 778. The same is true here.[17]

The "enemy" status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches. See, *e.g.*, *The Three Friends*, 166 U.S. 1, 63 (1897); *Prize Cases*, 67

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[17] Any suggestion that *Eisentrager* applies only to the forces of a nation in a *declared* war with the United States is erroneous and would have irrational consequences. Those involved in the attack on Pearl Harbor would have been eligible for more favorable treatment than Japanese soldiers captured after Congress had formally declared war. Similarly, although lawful combatants of a nation that had declared war could seek no recourse in our courts, the courts would somehow be more accessible to rogue forces or members of an international terrorist network that does not follow the laws or customs of war. Nothing in *Eisentrager* requires that bizarre result.

U.S. (2 Black) 635, 670 (1862). The U.S. military has determined that the Guantanamo detainees are enemy combatants. The President, in his capacity as Commander in Chief, has conclusively determined that the Guantanamo detainees —both al Qaeda and Taliban—are not entitled to prisoner-of-war status under the Geneva Conventions. See White House Press Secretary, *Fact Sheet, Status of Detainees at Guantanamo, supra.*[18] Any effort to look beyond such executive determinations concerning aliens held abroad would conflict with the rationale of *Eisentrager*. See Pet. App. 13a.

D. *Eisentrager* Did Not Bar Jurisdiction Only To Aliens Who Had Been Convicted Of War Crimes

Petitioners attempt to distinguish *Eisentrager* on the ground that the detainees in that case had been convicted by a military commission. See AO Br. 27; R. Br. 32-40. As the district court observed, "[w]hile it is true that the petitioners in *Eisentrager* had already been convicted by a military commission, the *Eisentrager* Court did not base its decision on that distinction. Rather, *Eisentrager* broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus." Pet. App. 54a (citation omitted).

Moreover, petitioners cannot make a virtue of the relative prematurity of their claims. Under petitioners' reading of *Eisentrager*, aliens captured and held abroad would have access to U.S. courts in the earliest stages of their detention, but not after hostilities had ended and the detainees had been convicted of military charges years later. Nothing in

[18] The Geneva Convention reflects criteria that an organization must meet under the laws and customs of war for its members to qualify as lawful combatants eligible for prisoner-of- war status, including that the organization's members must act in accordance with the laws and customs of war. See GPW, art. 4(A)(2). Neither al Qaeda nor the Taliban meet those criteria. See *Guantanamo Detainees, supra*. In any event, under the laws and customs of war, captured combatants may be detained for the course of the hostilities regardless of whether they are lawful combatants or unlawful combatants. See *Quirin*, 317 U.S. at 30- 31.

Eisentrager supports, much less compels, that counterintuitive result. To the contrary, even the dissenters in *Eisentrager* recognized the profound separation of powers difficulties occasioned by an exercise of judicial jurisdiction "while hostilities are in progress." 339 U.S. at 796 (Black, J. dissenting). Thus, far from curing the jurisdictional defect that this Court recognized in *Eisentrager*, the fact that petitioners in this case are being held while active fighting is still ongoing in Afghanistan and elsewhere and before they have been tried or convicted by a military commission, only demonstrates that this litigation implicates political questions that the Constitution leaves to the President as Commander in Chief.[19]

Petitioners' argument also creates a practical anomaly. The vast majority of aliens who are captured overseas by the military in connection with an armed conflict are detained during the course of hostilities without being charged with any war crime and without being tried or punished by a military commission. Such preventative detention is by definition not penal. See Winthrop, *supra*, at 788 ("Captivity is neither a punishment nor an act of vengeance," but rather "a simple war measure."). The relatively small percentage of aliens who are actually tried and convicted for war crimes often receive severe punishments, including death. Yet, un-

[19] Petitioners ask the courts to opine on the legality of the President's ongoing military operations and to release individuals who were captured during hostilities and who the military has determined should be detained. Particularly where hostilities remain ongoing, the courts have no jurisdiction, and no judicially-manageable standards, to evaluate or second-guess the conduct of the President and the military. These questions are constitutionally committed to the Executive Branch. That is particularly true where, as here, the President is acting with the full backing of Congress. See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring); see also *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2386-2387 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654, 668-669 (1981). Accordingly, although the courts below did not need to reach the issue, the political question doctrine provides an additional ground for affirming the judgment below.

der petitioners' construction of *Eisentrager*, habeas jurisdiction would *not* be available for those aliens who face the most drastic punishments—including death—as a result of their capture, and such jurisdiction *would* be available for the vastly greater number of aliens who are simply detained during the conflict without charge in order to prevent them from returning to the battlefield to aid the enemy.

E. The Jurisdiction Of U.S. Courts Does Not Turn On A Threshold Determination As To Whether An Alleged Executive Action Would Violate International Law

Petitioners argue (R. Br. 23-29; AO Br. 38-41) that jurisdiction must be available because the Guantanamo detentions allegedly violate the United States' international obligations. That is incorrect. The Guantanamo detentions are fully consistent with applicable principles of international law. But more important for present purposes, the availability of habeas jurisdiction does not turn on a threshold inquiry into the merits of a detainee's claims under international or domestic law.

The federal habeas statute has allowed treaty-based international law claims since at least 1867, and the prisoners in *Eisentrager* themselves raised claims under the Geneva Convention. J.A. 136. Nonetheless, *Eisentrager* held that the U.S. courts lacked jurisdiction over such claims and further emphasized that the Geneva Convention did not create any privately enforceable rights. 339 U.S. at 789 n.14; see Part IV, *infra*. Indeed, it would have made little sense for the *Eisentrager* Court to conclude that the same courts that are closed to constitutional claims nonetheless remain open to claims based on international law.

Petitioners' reliance (AO Br. 38-39; R. Br. 24-25) on the International Covenant on Civil and Political Rights (ICCPR) is particularly misplaced. The ICCPR—a multilateral agreement addressing basic civil and political rights—could not possibly be read to override *Eisentrager*. As Judge Randolph explained in his concurring opinion below,

the ICCPR is a non-self-executing treaty that does not create any privately enforceable rights at all. Pet. App. 22a; *Sosa* v. *Alvarez-Machain*, No. 03-339, U.S. Br. at 27 n.8 (03-339 U.S. Br.). Furthermore, by its terms, the ICCPR is inapplicable to conduct by the United States *outside* its sovereign territory. Article 2, paragraph 1 of the ICCPR provides that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within* its territory *and* subject to its jurisdiction the rights recognized in the present Covenant" (emphasis added). That territorial limitation is reinforced by the rule that "a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it." *Sale*, 509 U.S. at 183; see *id.* at 188.

The same analysis applies with respect to the other sources of international law relied upon by petitioners, including the Geneva Convention itself. See R. Br. 24-25; 03-339 U.S. Br. at 24-31. The Geneva Convention does not create privately enforceable rights, and Congress has never sought to create such rights through implementing legislation. Rather, as this Court recognized in *Eisentrager* with respect to the 1929 Geneva Convention, the "obvious scheme" of the Geneva Convention is that the "responsibility for observance and enforcement" of its provisions is "upon political and military authorities." 339 U.S. at 789 n.14; see Pet. App. 22a (explaining that Geneva Convention "is not self-executing") (citing *Hamdi*, 316 F.3d at 468-469; *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985)); *Huynh Thi Anh* v. *Levi*, 586 F.2d 625, 629 (6th Cir. 1978); see also *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989); *Federal Trade Comm'n* v. *A.P.W. Paper Co.*, 328 U.S. 193, 203 (1946).

Petitioners' reliance on *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), is similarly misplaced. In that case, the Court observed "that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.* at 118. The 200-

year-old *Charming Betsy* canon, however, does not provide any basis for overturning *Eisentrager*'s construction of the habeas statutes. Moreover, it would turn the *Charming Betsy* canon on its head to use it to expand the jurisdiction of the U.S. courts over the objections of the Executive and despite Congress's decision not to amend the habeas statutes in the wake of *Eisentrager*. The *Charming Betsy* canon is designed to ensure that federal courts *avoid* interfering in foreign-affairs matters assigned to the political branches. See *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 21-22 (1963). As explained in Part III below, holding that U.S. courts have jurisdiction to entertain claims filed on behalf of aliens detained at Guantanamo would place the federal courts into an unprecedented position of reviewing military and foreign affairs decisions that are reserved by the Constitution to the political branches.

F. The APA Does Not Confer Jurisdiction Over Petitioners' Claims

The *Al Odah* petitioners suggest that jurisdiction is available under the Administrative Procedure Act (APA). See AO Br. 21-23. The court of appeals correctly rejected that argument. See Pet. App. 17a-18a. In *Eisentrager*, the Court held that aliens held outside the sovereign territory of the United States lack the "privilege of litigation" in our courts. 339 U.S. at 777. It is true that the claims asserted by the prisoners in *Eisentrager* were made in the context of a petition for habeas corpus, but as petitioners themselves emphasize, habeas—not the APA—is the customary vehicle for challenging an executive detention. R. Br. 13. There is no reason to conclude that the *Eisentrager* Court precluded aliens held abroad from employing the Great Writ to challenge their detention, only to allow them to challenge that detention through the APA. In other words, petitioners' non-habeas claims, *a fortiori*, are precluded by *Eisentrager*.

In any event, there are additional obstacles to petitioners' APA claim. First, it is well-settled that "[c]hallenges to the validity of any confinement or to particulars affecting its

duration are the province of habeas corpus." *Muhammad* v. *Close*, No. 02-9065, 2004 WL 344163, *1 (U.S. Feb. 25, 2004) (per curiam); see *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-490 (1973). Although the *Al Odah* petitioners have argued that they are merely challenging the *conditions* of the detainees' confinement at Guantanamo and not the confinement itself, the district court correctly rejected that contention and reviewed the complaint in *Al Odah* "as if it were styled as a petition for writ of habeas corpus." Pet. App. 47a; see Gov't C.A. Br. 44-50. In any event, the question presented by this Court in this case is explicitly addressed to challenges to the "legality of the *detention*" of aliens at Guantanamo. 124 S. Ct. 534 (emphasis added). Furthermore, because petitioners challenge the conduct of ongoing military operations overseas, their claims are expressly precluded by the APA. See Pet. App. 27a-29a, 47a n.11; Gov't C.A. Br. 51-55.[20]

III. DEPARTING FROM *EISENTRAGER* WOULD RAISE GRAVE SEPARATION-OF-POWERS CONCERNS

Deviating from the principles recognized in *Eisentrager* would raise grave separation-of-powers concerns with respect both to the military's conduct of an ongoing armed conflict overseas and to Congress's responsibility to delineate the subject-matter jurisdiction of the federal courts.

1. a. "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); see *Curtiss-Wright*, 299 U.S. at 319, 320; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893). That constitutional commitment is at its height when it comes to the Executive's con-

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[20] The *Al Odah* petitioners also asserted jurisdiction under 28 U.S.C. 1350. As Judge Randolph explained in his opinion for the Court (Pet. App. 17a-18a) as well as in his concurring opinion (*id.* at 19a-29a), Section 1350 does not supply any jurisdiction (or any cause of action) with respect to petitioners' claims that does not otherwise exist in light of the principles discussed above. See also 03-339 U.S. Br. 46-49.

duct of military operations abroad. See U.S. Const. Art. II, § 2, Cl. 1. As this Court observed in *Eisentrager*, 339 U.S. at 788 (citation omitted): "The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution." See also *Quirin*, 317 U.S. at 28 ("An important incident to the conduct of war is the adoption of measures by the military command * * * to repel and defeat the enemy."); *Fleming*, 50 U.S. (9 How.) at 615 (President has authority, *inter alia*, to "employ [the U.S. armed forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy."); *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870).

b. Exercising jurisdiction over habeas actions filed on behalf of the Guantanamo detainees would directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters. The detention of captured combatants in order to prevent them from rejoining the enemy during hostilities is a classic and time-honored military practice, and one that falls squarely within the President's authority as Commander in Chief. See *Quirin*, 317 U.S. at 30-31; p. 4, *supra*.[21] Moreover, collecting and evaluating intelligence from captured combatants about the enemy or its plans of attack is a common sense and critical element of virtually any successful military campaign.

The intelligence-gathering operations at Guantanamo are an integral component of the military's efforts to "repel and defeat the enemy" (*Quirin*, 317 U.S. at 28) in the ongoing military campaign being waged not only in Afghanistan but around the globe. Any judicial review of the military's operations at Guantanamo would directly intrude on those important intelligence-gathering operations. Moreover, any judicial demand that the Guantanamo detainees be granted access to counsel to maintain a habeas action would in all likelihood put an end to those operations—a result that not only would be very damaging to the military's ability to win the war, but no doubt be "highly comforting to enemies of the United States." *Eisentrager*, 339 U.S. at 779.

c. More generally, exercising jurisdiction over actions filed on behalf of the Guantanamo detainees would thrust the federal courts into the extraordinary role of reviewing the military's conduct of hostilities overseas, second-guessing the military's determination as to which captured aliens pose a threat to the United States or have strategic intelligence value, and, in practical effect, superintending the Executive's conduct of an armed conflict—even while American troops are on the ground in Afghanistan and engaged in daily combat operations. That role goes beyond even what the dissenters in *Eisentrager* were willing to reserve for the courts. See *Eisentrager*, 339 U.S. at 796 (Black, J. dissenting) ("Active fighting forces must be free to fight *while hostilities are in progress*.") (emphasis added).

As this Court explained in *Eisentrager*, litigation of habeas claims filed on behalf of aliens held abroad—which inevitably would entail individualized challenges to the circumstances of an alien's capture and his affiliation with the

[21] In virtually every armed conflict in this country's history, military forces have detained enemy combatants during the course of hostilities and in their immediate aftermath. In the Revolutionary War, U.S. forces detained thousands of British and German citizens as prisoners of war, holding some for years until (or even after) the declaration of peace. See George Lewis & John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, Dep't of the Army Pamphlet No. 20-213, at 3, 7, 9, 12, 19-20 (1955). During the Civil War, approximately 96,000 prisoners of war were captured and detained by the Union Army; over 50,000 remained in custody at the time of the Confederate surrender. See *id.* at 41. In World War I, American forces had custody of approximately 48,000 prisoners of war in France between the 1918 armistice and the treaty of peace in 1920. See *id.* at 63. By the end of World War II, U.S. forces had custody of approximately 2 million enemy combatants. See *id.* at 244. Many of the detainees were not repatriated for several years after the conclusion of hostilities. See *id.* at 243-245. During each of these conflicts, only a small fraction of the detainees was prosecuted and punished for war crimes. The vast majority were simply detained during the conflict.

enemy—also would "hamper the war effort and bring aid and comfort to the enemy." 339 U.S. at 779. As the Court explained, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid.* *Eisentrager* avoids these grave constitutional problems.

d. The breadth of petitioners' arguments would extend the jurisdiction of U.S. courts to habeas petitions filed on behalf of aliens captured and detained on the battlefield in Afghanistan, or anywhere else in the world. Even petitioners, however, are not willing to accept the logical conclusions of their own claims. See Pet. 22 n.14 ("[N]othing in the present litigation implies habeas jurisdiction over Bagram Air Force Base in Afghanistan or other bases in the theater of military operations."). Petitioners seem to recognize that a ruling that the Constitution "follows the flag" for *all* aliens abroad would impermissibly hamper the Executive's conduct of foreign affairs. But there is no manageable and defensible basis, other than sovereignty (*i.e.*, the line drawn by this Court in *Eisentrager* and subsequent cases), for limiting the reach of the arguments that petitioners advance. Certainly, a "de facto control and jurisdiction" test would serve no limiting function at all, because the U.S. military exercises control over the detainees at Bagram Air Force Base as well —and would not detain prisoners in a facility that it did not control.

Moreover, drawing an arbitrary legal distinction between aliens held at a facility, such as the Bagram Air Force Base in Afghanistan, which is controlled by the U.S. military and located outside the sovereign territory of the United States, and aliens held at a facility, such as the Guantanamo Naval Base in Cuba, which is controlled by the U.S. military and located outside the sovereign territory of the United States, would create a perverse incentive to detain large numbers of

captured combatants in close proximity to the hostilities where both American soldiers *and* the detainees themselves are more likely to be in harm's way. Indeed, the Geneva Convention (art. 19, 75 U.N.T.S. 972) itself calls for the movement of prisoners of war "as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger."[22]

2. Departing from *Eisentrager* and holding that U.S. courts have jurisdiction over claims filed on behalf of the Guantanamo detainees also would intrude on Congress's authority to delineate the subject-matter jurisdiction of the federal courts, subject to constitutional constraints. See U.S. Const. Art. III, § 1; see also *Snyder* v. *Harris*, 394 U.S. 332, 341-342 (1969) ("If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts."); *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 117 (1981) (Brennan, J., joined by Marshall, Stevens, and O'Connor, JJ., concurring in the judgment) ("Subject only to constitutional constraints, it is exclusively Congress' responsibility to determine the jurisdiction of the federal courts.").

To be sure, the Constitution would limit the ability of Congress to extend federal court jurisdiction into areas that interfered with the core executive responsibilities. But especially when Congress itself has not attempted to confer such jurisdiction, even in response to this Court's clear recognition of the limits of the habeas statute in *Eisentrager*, the courts are not free to extend their statutory jurisdiction of their own accord in the absence of congressional action. Congress, moreover, is far better situated than the courts to weigh the significant foreign policy and military ramifica-

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[22] The importance of detaining captured combatants at a secure facility located outside an active combatant zone is underscored by the prison uprising that occurred in November 2001 at Mazar-e-Shariff, Afghanistan, which resulted in the deaths of scores of captured combatants as well as one U.S. intelligence officer and members of the Northern Alliance.

tions of extending federal jurisdiction over the claims of aliens held abroad and to address the myriad factors that might enter the equation.[23]

Furthermore, exercising jurisdiction over the actions filed on behalf of the Guantanamo detainees in this case almost certainly would lead to the filing of scores if not hundreds of follow-on actions by the relatives of other aliens held at Guantanamo, as well as, in all likelihood, actions filed on behalf of aliens held by the U.S. military abroad at other American-controlled facilities overseas. Cf. *Eisentrager*, 339 U.S. at 768 n.1 (noting that the court had received habeas petitions filed by "over 200 German enemy aliens confined by American military authorities abroad"). There is no indication that Congress, which is traditionally sensitive to the workload of the federal courts, intended to open the federal courts to the inevitable influx of such claims. Indeed, as discussed above, Congress did *not* enact the amendment proposed in 1951 that would have created such jurisdiction.

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[23] As the government explained to this Court in the brief that it filed in *Eisentrager*:

> Whether, and on what conditions, Congress should extend the same rights to alien enemies outside our territory as are available to those within may depend upon such factors as the distance from this country of the foreign places of confinement, the availability of witnesses and their amenability to the processes of our courts, the expenses of transportation, the number of potential applicants for the writ, the classes of detained enemy aliens, and the extent of judicial review available abroad, as well as upon our agreements with other powers, the need for expedition and finality in the execution of our international undertakings in punishing war criminals, and the policy demands of the occupation of enemy areas. Other factors to be weighed are whether the remedy shall be available at all times, even during the height of hostilities on foreign soil; the stage at which relief should be allowed, *e.g.*, before or after trial; whether special time and procedural provisions are appropriate; and the scope of review to be afforded in our domestic courts.

49-306 U.S. Br. at 70-71 (citation omitted).

IV. THE GUANTANAMO DETENTIONS ARE SUBJECT TO DIPLOMATIC AND POLITICAL SCRUTINY

1. In *Eisentrager*, the Court stressed that it was "not holding that these prisoners have no right which the military authorities are bound to respect." 339 U.S. at 789 n.14. The Court recognized that the detainees asserted violations of the Geneva Convention of 1929 concerning "the treatment to be accorded captives." *Ibid.* However, the Court concluded that the "obvious scheme" of the Geneva Convention is "that responsibility for observance and enforcement of these rights is upon political and military authorities." *Ibid.* As the Court continued, "[r]ights of alien enemies are vindicated under [the Geneva Convention] only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Ibid.*

Such a dynamic not only is available, but is actively engaged with respect to the Guantanamo detainees. The Guantanamo detainees have been the subject of international attention and diplomatic discussions, including at the highest level of state.[24] For example, U.S. officials have met with Australian officials concerning petitioners Hicks and Habib. See Australian Minister for Foreign Affairs and Attorney General, *Delegation Concludes Successful Talks On David*

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[24] See, *e.g.*, Office of the White House Press Secretary, *President Bush Arrives In England for Three Day State Visit* (Nov. 18, 2003) (noting discussions with the British and with other countries on the treatment of Guantanamo detainees) (<www.whitehouse.gov/news/releases/2003/11/20031118-3.html>); Office of the White House Press Secretary, *Remarks by President Bush and Prime Minister Howard of Australia* (Oct. 22, 2003) (noting discussions between the President and the Prime Minister of Australia on Guantanamo detainees of Australian nationality) (<www.whitehouse.gov/news/releases/2003/10/20031022-11.html>); Office of the White House Press Secretary, *Statement on British Detainees* (July 18, 2003) (discussing meeting between the President and Prime Minister Blair on "the issue of U.K. nationals detained at Guantanamo Bay") (<www.whitehouse.gov/news/releases/2003/07>); see also *President Bush, Prime Minister Sabah of Kuwait Discuss Middle East* (Sept. 10, 2003) (<www.whitehouse.gov/news/releases/2003/09/20030910-4.html>).

Hicks (July 24, 2003) (www.nationalsecurity.gov.au/ag). Similar discussions have taken place between U.S. officials and British officials and, as discussed above, the military has recently announced that it is preparing to transfer the British detainees at issue in this case (Rasul and Iqbal) to the custody of the British government.

At the same time, the Department of Defense has announced that, as a general policy, it does not wish to detain individuals once it has determined both that they no longer have potential intelligence value and that their release would not pose a threat to the United States or its allies. To date, more than 90 aliens have been released from Guantanamo. Eighty-eight individuals have been released without further custody, and 12 have been transferred to the custody of their own governments (Saudi Arabia, Spain, and Russia) for further detention or prosecution.[25] In addition, six detainees

[25] See, e.g., Dep't of Defense, News Release, *Transfer of Detainees Complete* (Mar. 1, 2004) (seven Russian detainees transferred to Russian government for continued detention) (<www.dod.mil/releases/2004/nr20040301-0389.html>); Dep't of Defense, News Release, *Transfer of Detainee Completed* (Feb. 25, 2004) (Danish national released) (<www.defenselink.mil/releases/2004/nr20040225-0365.html>); Dep't of Defense, News Release, *Transfer of Detainee Complete* (Feb. 13, 2004) (one Spanish-national detainee transferred for continued detention by Spanish Government) (<www.defenselink.mil/releases/2004/nr20040213-0981.html>); Dep't of Defense, News Release, *Transfer of Juvenile Detainees Completed* (Jan. 29, 2004) (three juveniles under the age of 16 released to their home country) (<www.defenselink.mil/releases/2004/nr20040129-0934.html>); Dep't of Defense, News Release, *Transfer of Detainees Completed* (Nov. 24, 2003) (20 detainees transferred to their countries of origin) (<www.defenselink.mil/releases/2003/nr20031124-0685.html>); Dep't of Defense, News Release, *Transfer of Detainees Completed* (July 18, 2003) (27 detainees released to countries of origin) (<www.defenselink.mil/releases/2003/nr20030718-0207.html>); Dep't of Defense, News Release, *Release/Transfer of Detainees Completed* (May 16, 2003) (one detainee released, four Saudi detainees transferred to Saudi Government for continued detention) (<www.defenselink.mil/releases/2003/b05162003_bt338-03.html>); Dep't of Defense, News Release, *Transfer of Detainees Completed* (May 9, 2003) (13 detainees transferred for release) (<www.defenselink.mil/releases/2003/b05092003_bt311-03.html>); Dep't of Defense, News Release, *Transfer of Detainees Completed* (Oct. 28, 2002) (four detainees released) (<www.defenselink.mil/releases/2002/b10282002_bt550-02.html>).

have been designated pursuant to the President's military order of November 13, 2001 and several, including petitioner Hicks, have been assigned military attorneys. As discussed above, two Guantanamo detainees have been charged with conspiracy to commit violations of the laws of war.

2. The military's detention of captured combatants at Guantanamo, just like the ongoing combat operations in Afghanistan and elsewhere around the globe, is subject to congressional inquiry. The President has reported to Congress on the ongoing military operations in Afghanistan, including the Guantanamo detentions. See, *e.g.*, *Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, *supra.* Numerous congressional delegations have visited Guantanamo. And members of Congress have questioned executive officials during congressional hearings and in written questions about the military's operations at Guantanamo.

3. The Executive's military operations at Guantanamo and, more generally, its efforts to eradicate the al Qaeda terrorist network and prevent additional terrorist attacks are the subject of intense public scrutiny as well. By constitutional design, the political branches are directly accountable to the people for foreign policy decisions made on their watch. See *Chicago & S. Air Lines, Inc.* v. *Waterman S.S Corp.*, 333 U.S. 103, 111 (1948). In that regard, the political branches occupy an entirely different position in our constitutional system than this Court. As the number of amicus briefs filed in this case underscore, the Guantanamo detentions are subject of intense public interest in this country and, indeed, the international community. The political branches ultimately are accountable for the conduct of the ongoing military campaign against al Qaeda and protecting the Nation from additional attacks. The military operations

at Guantanamo are a critical component of the Executive's efforts to accomplish those objectives.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. KATSAS
Deputy Assistant Attorney General
GREGORY G. GARRE
DAVID B. SALMONS
Assistants to the Solicitor General
DOUGLAS N. LETTER
ROBERT M. LOEB
SHARON SWINGLE
Attorneys

WILLIAM H. TAFT IV
Legal Adviser
Department of State

MARCH 2004

(41)

No. 03-343

Supreme Court, U.S.
FILED
APR 7 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

JOHN J. GIBBONS
GITANJALI S. GUTIERREZ
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, NJ 07102
Telephone: 973-596-4700
Facsimile: 973-596-0545

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
JARED A. GOLDSTEIN
HEATHER LAMBERG KAFELE
SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-508-8000
Facsimile: 202-508-8100

Attorneys for Petitioners

April 7, 2004

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The government has submitted an extraordinary brief. Citing documents created *after* this Court granted *certiorari* and never before presented to any court, the government claims for the first time that it has applied a thorough and careful screening and review process to the Guantanamo detainees and has deemed them all to be "enemy combatants." Government's Brief 5-7 ("G. Br."). In its carefully worded description, however, the government does not even assert that these newly minted processes were applied to these petitioners. This Court, moreover, is bound to assume, as did the district court and court of appeals, that the allegations in the complaint are true and that petitioners are innocent civilians taken into custody by mistake.[1]

[1] Because the Court is reviewing a decision granting respondents' motion to dismiss, it "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002). Petitioners alleged that none of them "is or ever has been a combatant or belligerent against the United States, or a member or supporter of al Qaida or the Taliban . . . or has ever engaged in or supported any terrorist or hostile act against the United States." Pet. App. 25. Based on these allegations, the district court properly rejected respondents' suggestion that it take "judicial notice" that petitioners are "enemy combatants." Pet. App. 56 n.12. Similarly, the court of appeals properly concluded, "[d]espite the government's argument to the contrary," that "none of the Guantanamo detainees are within the category of 'enemy aliens,' at least as *Eisentrager* used the term." *Id.* at 11.

There is also substantial reason to believe petitioners' claim of innocence. Senior military officials have publicly conceded the possibility that many of the Guantanamo detainees were seized by mistake. *See, e.g.*, Dep't of Def., Secretary of Defense Donald H. Rumsfeld, *Media Availability en route to Camp X-Ray* (Jan. 27, 2002) ("Were they picked up . . . unintentionally? Sometimes when you capture a big, large group there will be someone who just happened to be in there that didn't belong in there."); G. Miller, *Many Held at Guantanamo Not Likely Terrorists,* Los Angeles Times, Dec. 22, 2002, at 1-1 ("The United States is holding dozens of prisoners at Guantanamo Bay who have no meaningful connection to Al-Queda or the Taliban . . . according to military sources with direct knowledge of the matter."); V. Mabrey, *Camp Delta: Guantanamo Bay*, 60 Minutes II, Sept. 24, 2003 ("[A] senior American military interrogator . . . told 60 Minutes II that as many as 20 percent of the Guantanamo prisoners were sent by mistake.").

What is truly astounding is that the government attempts to persuade the Court that it has employed a fair and legitimate process for determining whether petitioners are enemy combatants while simultaneously declaring that courts have no authority to examine that process and, indeed, that national security would be threatened if they did so. None of the newly announced and proposed processes that the government describes are mandatory, and there is no reason to believe that the government would abide by them any more than it has abided by the existing military regulations that require an individualized hearing where any doubt exists as to a detainee's status, which the government never mentions in its brief. As suddenly as these new processes appeared after the Court granted *certiorari*, so might they suddenly disappear if the prospect of judicial scrutiny is removed.

The government animates its apocalyptic vision of the harms resulting from judicial review with repeated mischaracterizations of what petitioners seek, stating that petitioners are asking the courts to second-guess military judgments about the conduct of the war on terrorism, that petitioners are challenging the military's authority to capture and detain enemy combatants, that petitioners assert a right to counsel during military interrogations, and that petitioners seek individualized determinations by Article III courts as to their enemy status, G. Br. 43-44, none of which petitioners have ever sought. In this context, it is important to clarify what this case is and is not about.

This case does not question the authority of the military to capture persons on the field of battle. Nor does it question the authority of the military to detain persons properly determined to be enemy combatants until the end of hostilities. The military clearly has that authority. Petitioners also do not claim that enemy combatants have a right to relief under the habeas statute. It was well established under the common law that alien enemies—and, by proper

implication, others properly determined to be enemy combatants—have no right to habeas relief.[2]

But petitioners claim that they are not enemy combatants. The sole question here is whether, long after the military captured petitioners and moved them far from the field of battle to a place under exclusive U.S. control, any court has authority to examine whether the detentions are based on a lawful process for determining that petitioners are or are not enemy combatants. Petitioners do not claim that the courts must themselves conduct that process and review the basis for each individual detention. Rather, they contend that some lawful process must apply and that the courts have authority to ensure that one does.

The government, in contrast, takes the position that this Court's decision in *Johnson v. Eisentrager* and principles of separation of powers establish a rigid, mechanical rule under which the Executive has unlimited and unreviewable authority to detain aliens outside the technical sovereignty of the United States, based on any process it chooses to apply, or none at all; to hold the detainees indefinitely; to provide no process for reviewing the detainees' status; to treat the detainees however the Executive sees fit; and under no circumstances must the government answer to any judicial authority to justify the legality of its actions. Nothing in the Constitution, the jurisdictional statutes governing Article III courts, or this Court's decisions, however, deprives the courts of all power to consider the legality of the government's indefinite detention of petitioners. Reviewing the validity of the process by which the Executive imposes detention is a quintessential judicial activity and one that the courts have undertaken for centuries.[3]

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[2] *See* Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587 (1949); *cf. Johnson v. Eisentrager*, 359 U.S. 763, 777 n.8 (1950).

[3] *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing

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Whether the courts have jurisdiction to conduct such review is a straightforward yes-or-no question. Its binary character may appear to suggest that the opposing positions of the parties confront this Court with a choice between extremes. Nothing could be farther from the truth. Endorsement of the government's position—that no court has jurisdiction to review detentions imposed in a place where the government's exclusive control permits it to ship prisoners at will—would create a lawless enclave in which no inquiry can ever be conducted by a court into the most plausible complaints of the most outrageous governmental violations of basic human rights. That is truly an extreme position. Endorsement of petitioners' position that the courts have jurisdiction, on the other hand, would permit courts to grant or deny relief, preserving the rule of law while accommodating the practical exigencies and concerns that arise in the conduct and the wake of war.

I. *Eisentrager* Does Not Deny the Federal Courts Authority to Consider Petitioners' Claims

The plain language of the jurisdictional provision of the habeas corpus statute, 28 U.S.C. § 2241(a), establishes the district court's authority to hear petitioners' claims. Petitioners indisputably are "in custody under or by color of the authority of the United States," and also allege that they are "in custody in violation of the Constitution or laws or treaties of the United States."[4] Nevertheless, the government argues that the federal courts lack authority for three reasons. First, it contends that the *Eisentrager* opinion, which nowhere mentions 28 U.S.C. § 2241, nevertheless held that federal courts lack jurisdiction to consider claims of aliens outside the United States. G. Br. 14-17. Second, the government contends that, by not

the legality of executive detention, and it is in that context that its protections have been strongest.").

[4] 28 U.S.C. § 2241(c)(1), (3).

adopting legislation explicitly conferring jurisdiction upon the federal courts to consider habeas petitions filed by aliens outside the United States, Congress expressed its intent to preclude jurisdiction for such individuals. *Id.* at 17-19. Third, it contends that this Court in *Eisentrager* changed the traditional common law scope of habeas review and established an absolute rule that habeas jurisdiction exists to consider claims filed by aliens only if they are confined in an area over which the United States has technical sovereignty. *Id.* at 21-25. These contentions have no merit.

1. The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."[5] There is nothing ambiguous about the language of 28 U.S.C. § 2241. It plainly confers jurisdiction upon federal courts to consider habeas claims of individuals, such as petitioners, who are in custody of the United States or who allege they are being held in violation of the Constitution or laws or treaties of the United States. "'Where there is no ambiguity in the words, there is no room for construction.'"[6] Therefore, as a matter of plain statutory text, Section 2241 confers jurisdiction on the federal courts to consider petitioners' habeas claims. Furthermore, this Court has "often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."[7]

Consistent with these fundamental principles, the Court in *Eisentrager* nowhere stated or suggested that it lacked jurisdiction under Section 2241 to consider the petitioners' habeas claims in that case. The Court nowhere examined the text, purpose, or history of Section 2241, which one would obviously

[5] *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

[6] *United States v. Gonzales*, 520 U.S. 1, 8 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)).

[7] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

expect if the Court's analysis were based on that jurisdictional provision. Instead, the Court prefaced its analysis by quoting 28 U.S.C. § 2243: "The case is before us only on issues of law. The writ of *habeas corpus* must be granted 'unless it appears from the application' that the applicants *are not entitled to it*."[8] For the reasons it gave in its opinion, the Court concluded that the *Eisentrager* petitioners were "not entitled" to the writ. As petitioners explained in their opening brief, those reasons do not apply to them. Pet. Br. 26-38. In any event, the federal courts' jurisdiction under Section 241 to consider petitioners' claims does not depend on whether they are "entitled" to the relief they seek.[9]

At most, the *Eisentrager* opinion is ambiguous about jurisdiction. This Court has long held that habeas jurisdiction can be constricted only by "a clear and unambiguous statement of congressional intent."[10] Here, jurisdiction to consider petitioners' claims is required by the plain text of 28 U.S.C. § 2241; it should not be precluded on the basis of an ambiguous opinion of this Court.[11]

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[8] 339 U.S. at 767 (quoting 28 U.S.C. § 2243) (emphasis added). The government notes that the *Eisentrager* petitioners argued in their Supreme Court brief that the Court had jurisdiction under Section § 2241(a) to consider their habeas claims and deduces that the Court "necessarily rejected" petitioners' jurisdictional argument. G. Br. 16 n.5. This deduction is specious. The Court expressly assumed that petitioners satisfied the prerequisites for the federal courts' exercise of jurisdiction under Section 2241(a). *See* 339 U.S. at 766-67.

[9] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (it is "firmly established" that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction"); Pet. Br. 14 n.13.

[10] *St. Cyr*, 533 U.S. at 298.

[11] Similarly, the plain language of 28 U.S.C. § 1331 confers jurisdiction over federal questions, such as those raised on petitioners' APA claim. Nothing in the text of Section 1331 suggests any limitation based on the citizenship of the plaintiff or the location from which suit is brought. The government argues that *Eisentrager* forecloses petitioners' claim under the APA because *Eisentrager* broadly holds that aliens outside the sovereign territory cannot bring suit in the federal courts.

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2. Congress' failure to adopt an amendment to 28 U.S.C. § 2241 explicitly conferring habeas corpus jurisdiction over claims by aliens detained outside the United States says nothing about the meaning of the habeas statute as it was enacted by the First Congress and amended in 1867. As this Court has stated, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute."[12] The failure to take legislative action "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."[13]

3. *Eisentrager* did not establish an absolute rule conditioning jurisdiction on technical sovereignty, and the government cites no other case to support such a rule.[14] The two times the Court used the words "sovereign" and "sovereignty" with respect to territory, it appeared to use the words interchangeably with "territorial jurisdiction,"[15] strongly suggesting that it used the terms in the everyday sense to mean "supreme authority" over territory, a description that

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G. Br. 40. The government is plainly wrong that nonresident aliens are barred from bringing suit in U.S. courts, and courts that have examined the question have uniformly held that nonresident aliens are entitled to bring suit under the APA. *See, e.g., Estrada v. Ahrens*, 296 F.2d 690, 695 (5th Cir. 1961); *Constructores Civiles de CentroAmerica, S.A. v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972).

[12] *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

[13] *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

[14] Petitioners do not concede that the United States lacks sovereignty over Guantanamo. The U.S. Navy continues to inform the world on its website that the United States exercises "the essential elements of sovereignty over" Guantanamo and is the "supreme authority" there. The History of Guantanamo Bay: An Online Edition (1964), *available at* http://www.nsgtmo.navy.mil/history.htm; *see also Amicus Curiae* Brief of Retired Military Officers at 13-21.

[15] 339 U.S. at 778, 780.

plainly applies to the exclusive and absolute control that the United States exercises over Guantanamo.[16] There is no indication that *Eisentrager* or any other decision of this Court has required technical sovereignty to invoke the jurisdiction of the federal courts.[17]

Such a rule would be inconsistent with the traditional scope of habeas jurisdiction as it existed under the common law well before our Constitution was adopted. The government does not dispute that habeas jurisdiction under the common law extended to any person subject to the control of the Crown in any area over which the Crown exercised control and had the power to issue the writ.[18] There is no indication in *Eisentrager* that the Court rejected that longstanding common law rule. Any conclusion that it did so would be directly contrary to this Court's holding in

[16] Webster's 9th New Collegiate Dictionary 1128-29 (1988).

[17] In fact, the courts have often exercised jurisdiction over constitutional claims asserted by aliens in territories, such as the Panama Canal Zone, over which the United States clearly lacked technical sovereignty. *See* Pet. Br. 35-36 n.61. The government claims that the Canal Zone was different because Congress had established federal courts there. G. Br. 33. The court system was established in the Canal Zone, however, due to the foreseen civilian populace in that territory. Guantanamo, on the other hand, was intended to be a naval base. The difference between the bases is a result of their respective uses as described in the land agreements and not a result of any alleged difference in the degree of sovereignty. *See* R. Powers, Jr., *Caribbean Leased Bases Jurisdiction*, XV JAG J., 161, 163 (Oct.-Nov. 1961).

[18] *See, e.g., Rex v. Cowle*, 97 Eng. Rep. 587 (K.B. 1759); *Rex v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669); *see generally Note on the Power of the English Courts to Issue the Writ of Habeas Corpus*, 8 Jurid. Rev. 157 (1896) ("One of the most remarkable features of *habeas corpus* law in England is that the writ may be issued, not only to places within the ordinary jurisdiction of the English Courts, but also to places outwith that jurisdiction altogether."); W. Duker, A Constitutional History of Habeas Corpus 115 (1980); *Amicus Curiae* Brief of Legal Historians at 16-19; Amicus Curiae Brief of Commonwealth Lawyers Association at 2-6. Where other laws and legal systems were in place, the English courts refrained from exercising jurisdiction. *See* 8 Jurid. Rev. at 158.

St. Cyr that habeas jurisdiction remains available at least as it existed at the time the Constitution was adopted.[19]

Other than asserting that *Eisentrager* makes it so, the government offers no reasoned justification for an absolute rule against U.S. court jurisdiction over claims brought by detainees held in an area under exclusive U.S. control but outside technical U.S. sovereignty. The government asserts that technical sovereignty is the only "manageable and defensible" line to draw. G. Br. 44. Federal courts, however, have shown that they are able to distinguish between cases arising out of territory under the exclusive control of the United States and on which only U.S. law applies, and cases in which the assertion of jurisdiction by U.S. courts could clash with the laws and authority of other nations.[20] Furthermore, as Congress has indicated, the courts are capable of distinguishing "occupied territory" and "the field of battle," where military actions are beyond judicial review, and territory like Guantanamo, which is far removed from the battlefield, and where judicial review will not interfere with military judgment.[21] In any event, the government offers no explanation why a jurisdictional line should be drawn at technical sovereignty for aliens detained by the United States when the U.S. courts are open every day to hear diversity and federal question claims brought by aliens living in areas far from the control of the United States.[22] It would be

[19] *See St. Cyr*, 533 U.S. at 301.

[20] *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for Southern Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987) (federal courts may properly decline to assert jurisdiction over "cases touching the laws and interests of other sovereign states").

[21] 5 U.S.C. § 701(b)(1)(H).

[22] The government is clearly wrong to read *Eisentrager* as extending the "privilege of litigation" to "aliens, whether friendly or enemy," *only if* they are present in the country. Although nonresident *enemy* aliens may not have access to our courts, there is no doubt that non-enemy aliens have such access, even when they are not present in the

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anomalous, to say the least, if aliens detained by the United States are accorded no access to U.S. courts while other nonresident aliens are routinely granted the right to sue in the United States to complain of ordinary commercial harms.

The government relies on the presumption against construing federal law to apply extraterritorially, but that presumption has no application here. As this Court has recognized, the presumption against construing U.S. laws to apply abroad was established to prevent "unintended clashes" with the laws of foreign powers.[23] There is no possibility of such a clash at Guantanamo because only U.S. law applies there. Furthermore, the presumption against extraterritorial application of U.S. laws does not apply to the construction of jurisdictional provisions, such as 28 U.S.C. § 1331 and § 2241. "Unlike ordinary domestic statutes, jurisdictional statutes inherently present the question of how far Congress wishes U.S. law to extend. There is therefore no reason to presume that Congress did, or did not, mean to act extraterritorially."[24]

In enacting the habeas statute in 1789, Congress intended to adopt the common law scope of habeas review, which extended extraterritorially to claims by persons

country. In addition to the right of nonresident aliens to bring suit under 28 U.S.C. § 1331, discussed above, *see supra* note 11, under 28 U.S.C. § 1332 and Article III, Sec. 2, diversity jurisdiction is expressly provided for suits by "citizens or subjects of a foreign state," and diversity jurisdiction has long been understood to allow nonresident aliens to bring suit in U.S. courts. *See Breedlove v. Nicolet*, 32 U.S. 413, 431-32 (1833) (Marshall, C.J.); *see also* 28 U.S.C.A. § 1332 notes 1291-1360. In 1988, Congress confirmed that permanent *resident* aliens do not qualify as aliens for diversity purposes, *see* 28 U.S.C. § 1332(a), thus further demonstrating Congress's intent that *nonresident* aliens are entitled to sue under § 1332.

[23] *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

[24] *United States v. Corey*, 232 F.3d 1166, 1171 (9th Cir. 2000) (Kozinski, J.).

held outside the borders but subject to the control of the Crown.[25] Any other rule would not only be contrary to the plain language and history of the statute, it would also make no sense. It would give the Executive unchecked power to evade judicial examination of decisions—even decisions made in the United States—simply by choosing to hold their prisoners outside U.S. sovereign territory. Guantanamo offers the Executive the perfect refuge to try to accomplish that purpose—it is a unique area under exclusive U.S. control and therefore beyond the reach of any foreign court, while also, assertedly, beyond the reach of the U.S. courts. The Executive's purpose was clear;[26] the result should not be allowed.

II. Judicial Review of Petitioners' Claims Would Not Interfere with Separation of Powers

The government bluntly declares that judicial review would be "very damaging to the military's ability to win the war," that any court involvement would "directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters," and that judicial review would "no doubt be highly comforting to enemies of the United States." G. Br. 42, 43. The Executive has made similar claims throughout our nation's history, and they have consistently been rejected.[27]

[25] *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (in construing "the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law").

[26] *See* Col. Daniel F. McCallum, *Why GTMO?*, at 6-8, *available at* http://www.ndu.edu/nwc/writing/AY03/5603/5603G.pdf.

[27] This Court has thus held that principles of separation of powers do not give the executive unlimited and unreviewable authority to punish desertion by soldiers on the field of battle, *Trop v. Dulles*, 356 U.S. 86 (1958); to maintain steel production during wartime, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); to punish acts of sabotage by alien enemies, *Ex parte Quirin*, 317 U.S. 1 (1942); to seize enemy property, *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); to annex territory seized by military conquest, *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850); to impose internments on resident aliens and U.S. citizens, *Korematsu v. United States*, 323 U.S. 214 (1944); to exercise

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Although the Executive is entitled to considerable discretion in exercising military authority, this Court has long understood that "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[28]

The government invokes national security concerns on the false premise that petitioners are asking the courts to second-guess military judgments. Petitioners seek judicial review limited to what is necessary to ensure that the Executive employs a legitimate process to distinguish enemy combatants from innocent civilians. The government cannot plausibly argue that national security is threatened by such a process because the military's own regulations require it, and the military has provided that process to detainees in every conflict since World War II.[29] In signing and ratifying Geneva Convention III, which mandates that detainees be provided access to an impartial tribunal where there is any doubt as to their status, Congress and the President likewise concluded that national security is not threatened by providing an impartial process to persons captured in wartime. Ensuring that the government adheres to procedures ratified by Congress and adopted in executive regulations cannot plausibly be said to interfere with the President's war powers or threaten national security.

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court martial authority over former servicemen, *Toth v. Quarles*, 350 U.S. 11 (1955); to impose punishment on military dependants abroad, *Reid v. Covert*, 354 U.S 1 (1957); and to declare martial law and try civilians, *Ex parte Milligan*, 71 U.S. 2 (1866). *See* Pet. Br. 42-47.

[28] *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

[29] *See* Pet. App. 80; *Amicus Curiae* Brief of Experts on the Law of War at 9-11, filed in *Hamdi v. Rumsfeld*, No. 03-0696. The government has denied the Guantanamo detainees POW status because they were dressed as civilians, while proclaiming that no impartial tribunals are necessary because "there is no doubt about their status." *Response of the Govern̈ment of the United States of America to Inter-American Commission for Human Rights*, Jan. 5, 2004. But many people dressed as civilians are in fact innocent civilians, making impartial tribunals all the more necessary.

Rather than arguing that national security would be threatened by the relief petitioners actually seek, the government argues that national security is threatened by various forms of relief that petitioners do not seek and have never sought. The government argues that national security would be threatened by providing detainees access to lawyers during intelligence interrogations, *see* G. Br. 42-43, but petitioners have never asserted a right to have counsel present during intelligence interrogations.[30] The government further argues that national security would be threatened by giving all detainees individualized review by Article III courts of the legitimacy of their capture, *id.* at 55, but petitioners have expressly disclaimed any right to challenge their initial capture. Pet. Br. 4; J.A. 14-35. Indeed, petitioners have never sought to have Article III courts make *any* individualized determinations of petitioners' alleged status as enemies or to second-guess military determinations as to which aliens pose a threat to the United States. Instead, petitioners maintain that the courts must stand watch to ensure that the Executive imposes detentions only based upon a lawful process. Review of the legality of that process "would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case."[31]

The government's invocation of the political question doctrine, G. Br. 35, 37 n.19, suffers from similar flaws. To

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[30] The government now concedes that detainees subject to criminal processes have a right to counsel. *See* Military Order No. 1, 68 Fed. Reg. 39,374 (July 1, 2003). It appeared that such a point had arrived in February of 2002 when Secretary of Defense Rumsfeld declared that the interrogation of the detainees for intelligence purposes had ended and that the detainees were being interrogated for purposes of criminal prosecution. J.A. 31 ¶ 35; Pet. App. 97. The government has now apparently retreated from that declaration.

[31] *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 680 n.11 (1986). Furthermore, petitioners have indicated from the outset that a court reviewing their claims should establish reasonable procedures to protect national security. J.A. 34 ¶ 4.

establish that petitioners' claims are nonjusticiable under the political question doctrine, the government must demonstrate that a provision of the Constitution establishes "a textually demonstrable constitutional commitment" to give the President unreviewable authority to impose indefinite detentions on aliens seized and detained abroad, or alternatively, the government must establish that courts lack competence to determine the legality of petitioners' detention.[32] The government attempts neither. Instead, the government attacks straw men by arguing that the political question doctrine precludes courts from reviewing questions that petitioners have never sought to litigate, such as the "legality of the President's ongoing military operation," G. Br. 37 n.19, and whether petitioners are actual enemies of the United States, *id.* at 35. Petitioners have repeatedly made clear that they only seek judicial review to ensure that the Executive employs a lawful process for imposing detention on them, and nothing in the political question doctrine precludes courts from making that quintessentially judicial determination.

In contrast to the limited judicial review petitioners seek, the government advances the stark proposition that United States courts *never* have authority to review the detention of aliens so long as the Executive chooses to imprison them outside the technical sovereignty of the United States. *See* G. Br. 41-44. The government's position does not depend on the existence of an armed conflict or whether the detainees are enemy combatants, as it insists that no aliens detained outside the country have a right to judicial review at any time. *Id.* at 12. The government thus takes the position that, no matter what the Executive does to aliens abroad, and no matter how long it does so, there

[32] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

are no circumstances under which it must answer to the judiciary or justify the legality of its actions. *Id.* at 41-44.[33]

The government's position that the military has unreviewable authority over aliens abroad greatly exceeds the reasoned conclusion of Congress, which, in enacting the APA, gave careful consideration to what exercises of military judgment should be shielded from judicial review and which should not. Rather than adopting a blanket exemption from judicial review for all actions by the military abroad, Congress enacted narrow exemptions for the decisions of "military commissions," for military actions "exercised in the field in time of war," and for military actions undertaken in "occupied territory," none of which are applicable here.[34] Because the narrow exemptions for military action adopted in the APA were duly enacted by Congress and signed by the President, they are entitled to the greatest degree of judicial deference.[35] In contrast, the government's assertions of unlimited authority over aliens seized abroad, which has no backing by congressional enactment, is entitled to no such respect. This Court has repeatedly rejected similar attempts to aggrandize Executive power, recognizing instead "Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch."[36]

[33] The government's assertion of Executive power goes so far as to suggest that even Congress lacks power to legislate with regard to executive detentions of aliens abroad. G. Br. 45.

[34] 5 U.S.C. § 701(b)(1)(F), (H).

[35] *See Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

[36] *Mistretta v. United States*, 488 U.S. 361, 380-81 (1989); *see also Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

III. The Substantive Scope of the Fifth Amendment Has No Bearing on the Jurisdiction of the Courts to Hear Petitioners' Claims

The government argues that there is no jurisdiction to review petitioners' claims because, purportedly, the protections of the Fifth Amendment have no application to aliens detained abroad. *See* G. Br. 19-20, 26. That argument is a non-sequitur: although the substantive scope of the Fifth Amendment may affect the *merits* of petitioners' claims of unlawful detention, it says nothing about the *jurisdiction* of the courts to consider petitioners' claims. Moreover, the Fifth Amendment's due process clause is but one of many substantive bases for petitioners' claim that their detention is unlawful, as petitioners also allege that their detention violates military regulations, the Military Order, and treaties of the United States. Even if the government is correct that there is no merit to petitioners' due process claim, that conclusion would not affect the merit of petitioners' other claims, nor would it affect the jurisdiction of the courts to consider those claims.[37]

Beyond that, the authority of the judiciary to review the legality of executive detentions does not derive from the Fifth Amendment and, indeed, predates the adoption of the Bill of Rights. Under the habeas provision in the First Judiciary Act, the courts were authorized to examine

[37] In support of its argument that the Fifth Amendment does not protect aliens detained abroad, the government relies on this Court's citations to *Eisentrager* in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990), and *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). *See* G. Br. 19-20. Those citations demonstrate, however, that this Court has not regarded *Eisentrager* as a jurisdictional decision (in which case the discussion of the extraterritorial application of the Fifth Amendment would be dictum) but rather has looked to *Eisentrager* as a decision on the merits. In any event, this Court has recognized that aliens abroad are entitled to be treated in accordance with Fifth Amendment standards of fair play and substantial justice before being subjected to the processes of U.S. courts. *See Asahi Metal Indus. Co. v. Superior Ct. of California*, 480 U.S. 102, 113 (1987).

executive detentions and to grant relief if the Executive could show no lawful process or basis for the detention.[38] The adoption of the Bill of Rights was never intended to diminish this fundamental protection of human liberty.

IV. The Proposition that the Executive Can Evade Judicial Review By Detaining Individuals Outside the Nation's Borders Is Anathema to International Law

Although the government argues that international law has no bearing on the jurisdictional issue presented by this case, international law is relevant to jurisdiction in two distinct ways. First, 28 U.S.C. § 2241(c)(3) provides jurisdiction over claims that a prisoner "is in custody in violation of the Constitution or laws or *treaties* of the United States," and petitioners allege that they are being detained by the United States in violation of two treaties ratified by Congress, Geneva Convention III and the International Covenant on Civil and Political Rights. Section 2241 on its face establishes the district court's jurisdiction to hear petitioners' claim of a violation of international treaties to which the United States is a party.[39] The government argues at length that petitioners' treaty-based claims are meritless, G. Br. 38-39, but such arguments have no relevance to the jurisdictional question before this Court, as even the government concedes that the "availability of habeas jurisdiction does not turn on a threshold inquiry into the merits of a detainee's claims under international or domestic law." *Id.* at 48.[40]

[38] *See* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 970-75 (1998).

[39] Likewise, 28 U.S.C. § 1331 establishes district court jurisdiction of all civil actions arising under the "treaties of the United States."

[40] Moreover, the government is wrong on the merits of petitioners' treaty-based claims. With respect to Geneva Convention III ("GC III"), the International Committee of the Red Cross, charged with monitoring

(Continued on following page)

Second, international law is relevant to the jurisdictional question because, pursuant to the principle recognized by this Court in *Murray v. Schooner Charming Betsy*, the statutes at issue in this case, like other congressional enactments, "ought never to be construed to violate the law of nations if any other possible construction remains."[41] To construe 28 U.S.C. §§ 1331 and 2241 as the government urges—to foreclose judicial review to persons under indefinite detention by the United States in territory under exclusive U.S. control but outside the nation's borders—would be inconsistent with a uniform body of international law. Every civilized nation and international tribunal that has considered the question has rejected the proposition that a state's obligation to provide judicial review to those it detains ends at its borders, and instead have looked to whether the territory and individuals are subject to the state's authority and control.[42] The principle announced by this Court in *Charming Betsy* establishes

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compliance with the Geneva Conventions, has publicly rebuked the United States for failing to convene the individual "competent tribunals" required by Article V of GC III. *See* ICRC Operational Update, *Guantanamo Bay: the work continues*, July 18, 2003; *see also* A. Higgens, *Agency Decries Cuba Detainees' Detention*, Associated Press, Oct. 10, 2003. The government's claim that the Geneva Conventions are not self-executing, G. Br. 39, is beside the point since 28 U.S.C. § 2241 and 5 U.S.C. § 702 each provide petitioners a cause of action by which their GC III claims can be heard. *See Amicus Curiae* Brief of Experts on the Law of War at 16-20, filed in *Hamdi v. Rumsfeld*, No. 03-0696. Moreover, the requirement in GC III of an impartial hearing has been held to be self-executing. *Id.* at 21-27. The government's claims regarding the International Covenant on Civil and Political Rights are similarly specious. *See Amicus Curiae* Brief of Human Rights Institute of International Bar Association at 14-21.

[41] 6 U.S. (2 Cranch) 64, 118 (1804).

[42] *See* Pet. Br. 40-41; *see also Amicus Curiae* Brief of Human Rights Institute of the International Bar Association at 18-21; *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Office of the United Nations High Commissioner for Human Rights, 78th Sess. ¶ 10, CCPR/C/74/CRP.4/Rev.5 (March 2004) (states are responsible for ensuring human rights protections for all persons under their "effective control," even if they are not within the state's territorial boundaries).

that, if there is any doubt regarding the jurisdiction of the courts to hear petitioners' claim, the jurisdictional statutes should not be construed to make the United States a pariah among the international community.

The government mistakenly reads the *Charming Betsy* rule to reflect a different concern—that, pursuant to separation of powers principles, courts should avoid interfering with the Executive's foreign affairs powers. *See* G. Br. 39-40.[43] The *Charming Betsy* rule is not intended to give free reign to the Executive whenever international affairs are implicated; rather, it is a freestanding principle of statutory construction, applied to prevent U.S. law from conflicting with international legal norms.[44] The longstanding principle embodied in the *Charming Betsy* rule reflects the Founders' recognition that "the judgment of other nations is important . . . particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can followed."[45]

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[43] The government relies on this Court's decision in *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 21-22 (1963), but that case does not suggest that courts should defer to the executive's foreign affairs power in spite of international law. The Court in fact held that statutes should be construed consistently with *both* foreign affairs policy and "well-established rule[s] of international law." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (discussing *McCulloch*).

[44] *See, e.g., Weinberger*, 456 U.S. at 32 (*Charming Betsy* provides a "maxim of statutory construction" to construe acts of congress consistently with international law); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (Scalia, J., dissenting) (describing the rule in *Charming Betsy* as a "canon of statutory construction . . . relevant to determining the substantive reach of a statute" in light of "'the law of nations,' or customary international law"); *see also* Restatement (Third) of Foreign Relations Law of the United States § 115 cmt. a (1987).

[45] The Federalist No. 63 (Alexander Hamilton).

CONCLUSION

What is at issue in this case is not the policy of this or any particular presidential administration, but rather the authority of the federal courts to review the actions of the Executive Branch now and in the future. The Executive argues that it has absolute immunity from judicial examination whenever it elects to hold foreign nationals outside U.S. sovereign territory. It claims Guantanamo as a judicial-free zone for the people it captures in the war on terrorism. And because that war takes place in every corner of the globe, the Executive's claim would allow it to capture any foreign national anywhere in the world at any time and to detain him or her at Guantanamo without process or possibility of judicial review, forever. That position has no precedent in our history; it contravenes the fundamental ideals upon which this nation was founded and which it has come to symbolize around the world. Regardless how the courts may eventually decide these cases on the merits, confirming that the courts have the authority to examine the Executive's actions, at least in an area such as Guantanamo that is subject to exclusive U.S. jurisdiction and control, will confirm that in America it is still true that no government official is above the law, and that even in times of stress and danger the rule of law will continue to apply.

Respectfully submitted,

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
JARED A. GOLDSTEIN
HEATHER LAMBERG KAFELE

SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-508-8000
Facsimile: 202-508-8100

JOHN J. GIBBONS
GITANJALI S. GUTIERREZ

GIBBONS, DEL DEO,
DOLAN, GRIFFINGER &
VECCHIONE, P.C.
One Riverfront Plaza
Newark, NJ 07102
Telephone: 973-596-4700
Facsimile: 973-596-0545

Attorneys for Petitioners

April 7, 2004

Nos. 03-334 and 03-343

Supreme Court, U.S.
FILED
JAN 12 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SHAFIQ RASUL, et al.,

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v.

GEORGE W. BUSH, et al.,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF INTERNATIONAL LAW AND JURISDICTION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

DAVID D. CARON
Boalt Hall
UNIVERSITY OF CALIFORNIA AT BERKELEY
Berkeley, CA 94720
510-642-7249

ANNE-MARIE SLAUGHTER
WOODROW WILSON SCHOOL
PRINCETON UNIVERSITY
Princeton, NJ 08544
609-258-4800

JOHN H. BARTON
Counsel of Record
STANFORD LAW SCHOOL
Stanford, CA 94305
650-723-2691

BARRY E. CARTER
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue
Washington, DC 20001
202-662-9322

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE AMICI CURIAE

The amici, International Law and Jurisdiction Professors, include John H. Barton, the George E. Osborne Professor of Law Emeritus at Stanford University, David Caron, the C. William Maxeiner Distinguished Professor of Law at the University of California, Berkeley, Barry E. Carter, Professor of Law at Georgetown University and Anne-Marie Slaughter, Dean of the Woodrow Wilson School at Princeton University. All are academic international law experts who have devoted significant attention to the jurisdictional aspects of national and international law in areas such as international criminal law, international economic law, and human rights.[1] Professors Barton and Carter are members of the bar of this Court.

The amici do not seek to comment on the merits of any claims or defenses. Rather, they wish to raise to this Court the need to extend judicial review to certain extraterritorial actions by the United States government and the feasibility of doing so consistently with the Constitution and with the demands of international law.

STATEMENT

Petitioners are detained at the U.S. Naval Base at Guantanamo Bay by U.S. armed forces. With one exception, they have been imprisoned without recourse to court

[1] No counsel for any party authored any part of this brief. No person other than the amici made a monetary contribution to the preparation or submission of this brief. The parties' written consents to the filing of this brief have been filed with the Clerk.

process or access to counsel.[2] The United States maintains exclusive authority and control over this Naval Base, which it occupies under a lease from the Government of Cuba.

Protection against arbitrary detention is guaranteed by the United States Constitution, by virtually every nation's domestic laws, and by international law. The United States government should not be entitled to ignore these legal requirements through an assertion that its activities in the area involved are not subject to the jurisdiction of U.S. federal courts.

SUMMARY OF ARGUMENT

Both the Constitution and international law counsel in favor of this Court's authority to review those extraterritorial activities of the United States government that involve fundamental rights protected by the Constitution and by international law.

Changes in the international system have reshaped the traditional concerns of comity and of respect for the executive's freedom of action in foreign policy that have historically led this Court to restrain the exercise of its power in the international and foreign policy context. In particular, the concerns of comity now permit and demand that this Court take jurisdiction and apply Constitutional

[2] The person is Mr. David Hicks, as described in Neil A. Lewis, *Taliban Detainee is Depressed, Lawyer Says*, N.Y. Times, Dec. 18, 2003, at A29.

or international human rights principles. Similarly, concerns of foreign policy are met by exercising jurisdiction, but taking into account the appropriate foreign policy concerns. These concerns now require application of constitutional and human rights principles in a case involving international criminal law.

ARGUMENT

I. The increasingly international activity of the United States government counsels in favor of this Court's review of certain extraterritorial actions of the United States executive.

The prisoners held at the United States Naval Base at Guantanamo are not the only persons who will be affected by the Court's jurisdictional decision in this case. In the aftermath of September 11, 2001, it appears possible that the United States executive will establish its own special criminal court process, seeking to avoid the use of Article III judges and to use instead an executive form of review rather than an independent judicial review, such as that provided by this Court, *Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57833 (Nov. 16, 2001). This new process may be applied far beyond those captured in connection with the Afghanistan or Iraq actions, for the war on terrorism is likely to last indefinitely.

Moreover, precedents set in this terrorism conflict may end up being applied as well to international narcotics or money-laundering offenses. International activity has already become increasingly important in the prosecution of

traditional crime within traditional courts. This is a result of the internationalization of crime itself and of the greater mobility of defendants. More and more, evidence collected in or a confession obtained in one jurisdiction is used in prosecutions in another jurisdiction. There is an important problem here if the evidence or confession is obtained in a way that is legitimate in one jurisdiction but not the other, especially if prosecution and evidence collection are designed to take advantage of such differences,[3] and a serious human cost if, because of inaction by supervisors or courts, the evidence collection processes sink below a lowest-common-denominator.[4]

For many of these activities, there will be no judicial supervision of the criminal law process unless review is extended to at least some international and extraterritorial activities. The United States, together with its allies, is building a global criminal law system.[5] As the executive

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[3] *See,* e.g., *United States v. Balsys*, 524 U.S. 666, 698 (1998) (recognizing that in the self-incrimination context close cooperation among authorities of different nations might require a greater willingness to take jurisdiction).

[4] *See,* e.g., *Christopher v. Harbury*, 536 U.S. 403 (2002) (allegations of torture and murder by Guatemalan military officers who were also allegedly paid CIA agents in early 1990s); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (allegations of abduction by U.S. agents in Uruguay in 1973 for trial in United States).

[5] *See,* e.g., CENTER FOR INTERNATIONAL CRIME PREVENTION, UNITED NATIONS OFFICE FOR FOOD AND DRUG CONTROL AND CRIME PREVENTION; GLOBAL REPORT ON CRIME AND JUSTICE III (Graeme Newman, ed., 1999). Writing in the Foreword, Pino Arlacchi, the Executive Director of the United Nations Office for Drug Control and Crime Prevention, stated "Crime and justice are no longer simply local or national issues. They are global concerns which require careful study and concerted international action."

acts internationally in ways that are like those of domestic criminal law enforcement, and as international issues become more important in daily life, Constitutional freedoms may become meaningless unless appropriate judicial restraints are applied.

Criminal law is not the only internationalizing area. A variety of economic issues are now being dealt with internationally, and they are becoming so significant as to implicate the heart of our national economic activity. As our economy globalizes, it is again essential to apply legal restraints to the executive. For business to function efficiently, its leaders must be able to have confidence in the existence of an orderly regime of trade regulation that maintains the predictability of judicial control. Again, judicial review of some foreign policy actions will be essential.

II. This Court can take jurisdiction over the prisoners at Guantanamo consistently with the evolution of the Constitutional and international law concerns underlying judicial hesitation at reviewing international activity.

The Court has found it difficult to define a standard for extending jurisdiction beyond the nation's borders, and, as stated by then-Justice Rehnquist, the decisions in this area "offer little precedential value," *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981). Thus, *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) suggests that the Constitution stops at

the water's edge: "extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited." In contrast, the later case, *Reid v. Covert*, 354 U.S. 1, 7 (1957) states that "The language of Art. III, § 2 manifests that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country as well as here at home."

The Court's hesitation appears to reflect two groups of factors. The first, although not applicable in this case, is comity, or respect for the traditional territorially-based balance of jurisdiction between U.S. and foreign courts. This is not only a question of conflict of laws; it is also a question of whether the specifics of the U.S. Bill of Rights are appropriate in areas governed by different legal traditions, as reflected for example in the *Insular Cases*,[6]

[6] E.g., *Balzac v. Puerto Rico*, 258 U.S. 298 (1922) (jury trial in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (grand jury in Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial in Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (grand jury and jury trial in Hawaii); *Downes v. Bidwell*, 182 U.S. 244 (1901) (revenue provisions in Puerto Rico). In *Dorr*, for example, the concern was that the annexed territory used European civil law with procedures quite different from those of the Anglo-American procedures envisioned in the Bill of Rights. Should, for example, an accused in such a region have a right to a jury? In 1904, this Court answered with a no, in *Dorr*, 195 U.S. at 148:

> If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the Untied States extends . . . it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be formally established, although the result may be to work injustice and

(Continued on following page)

which involved the standards to be applied to the territories acquired following the 1898 Spanish-American war. The second, quite different, group of factors reflects the separation of powers concerns about hampering the ability of the executive to operate effectively in international affairs. As will be shown below, courts worldwide are now interpreting the first group of factors to permit greater extraterritorial exercise of jurisdiction. Moreover, recognizing that law can increasingly be applied in some aspects of international relations, they are narrowing the areas within which executives have discretion and applying constitutional or human rights standards to executives in foreign policy actions in a growing number of contexts.

A. The contemporary principles of comity

Comity counsels concern over taking jurisdiction over activities outside the forum territory. It is normal, however, for a court to hear a case when the court has personal jurisdiction over the relevant defendants, and the facts involved in the dispute require it to consider extraterritorial

> provoke disturbance rather than to aid the orderly administration of justice . . . Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

actions. This happens all the time and is a basic situation for applying the principles of conflicts of laws, under which the court may apply foreign law, or in some cases, forum law, to the foreign issues. The Guantanamo case involves precisely this pattern – the U.S. government is the effective defendant, the questions involve consideration of foreign U.S. government actions, and the issues ultimately before the court are whether to apply U.S. law (e.g., the Bill of Rights), to apply foreign or international law, or to decline to hear the case and thus apply no law at all.

Traditionally, courts have been willing to apply forum law to foreign issues when there is a domestic effect and when the forum law reflects universal principles. The United States has long recognized the first of these principles, at least since Judge Learned Hand's opinion in *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). There are now classic examples in both antitrust, *Hartford Fire Ins. v. California*, 509 U.S. 764 (1993), and securities law, *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968).[7] This antitrust position has been followed abroad, Cases 89/85, 104/85, 114/85, 116-117/85 & 125-129/85, *A. Ahlström OY v. E.C. Commission ("Wood Pulp")*, 1988 E.C.R. 5193.

Moreover, there are now many anti-terrorism statutes that criminalize actions abroad, e.g., the Antiterrorism Act of 1990, 18 U.S.C. §§ 2331-2339 (2000) (as amended); the Antiterrorism and Effective Death Penalty Act of 1996,

[7] *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402 & 403 (1986), providing bases for jurisdiction to prescribe and defining a balancing test limitation on that jurisdiction.

110 Stat. 1214 (West 1996); the Destruction of Aircraft or Aircraft Facilities Act, 18 U.S.C.A. § 32 (2000); and the Hostage Taking Act, 18 U.S.C.A. § 1203 (West 2002). Recent statutes also authorize damages against torturers abroad, Torture Victim Protection Act of 1991, 106 Stat. 73 (West 1992). Extraterritorial criminal statutes have now been the basis of U.S. criminal prosecutions based on extraterritorial activity, e.g., *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998); *United States v. Usama Bin Laden*, 92 F.Supp.2d 189 (S.D.N.Y. 2000).

Some of the requirements of comity are incorporated in the act of state doctrine.[8] Reading the doctrines together, in certain cases, they counsel abstention from applying national or international law to activity, particularly that of foreign governments, taking place in a foreign jurisdiction and lead either to applying foreign law or to not hearing the case. Among the factors that affect the choice between abstention and jurisdiction are (1) a Congressional judgment that the national (U.S.) law should be applied extraterritorially and a clear conflict between the U.S. and the foreign principles, as reflected in *Hartford Fire Ins.*, 509 U.S. at 798-99 (agreement in restraint of trade by United Kingdom insurance companies in the United Kingdom), (2) consideration of the balance of

[8] *See*, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Regina v. Bow Street Metropolitan Stipendiary Magistrate Search Term End and Others, Ex Parte Pinochet Ugarte*, (No. 3) [2000] 1 A.C. 147, 160 (H.L.) (act of state doctrine does not prevent extradition of Pinochet); *Kuwait Airways Corp. v. Iraqi Airways Co.*, (Nos. 4 & 5) [2002] 2 A.C. 883 (H.L.) (rejecting application of the act of state doctrine when the result would be contrary to public policy).

factors favoring or disfavoring application of the U.S. law, again described in *Hartford Fire Ins.*, 509 U.S. at 817-22 (dissenting opinion), and (3) a recognition that certain international principles, such as those governing expropriation or torture, are so important as to override concerns of offending the foreign jurisdiction, as required by 22 U.S.C. § 2370(e)(2) (2000) (Hickenloooper Amendment).

This Court has been willing to take a broad approach to taking jurisdiction to apply antitrust principles extraterritorially – in this case, there is at least as strong an argument for taking jurisdiction and applying either U.S. law, e.g., the Bill of Rights, or international law such as international human rights law. As noted above, the defendant is before the Court. And there is good reason not to apply the act of state doctrine. There is no concern in this case with a conflict between U.S. law and local law, the balance of factors certainly favors applying U.S. law, and the U.S. law reflects global human rights principles.

In providing jurisdiction to the U.S. federal courts in this case, this Court would follow a trend already paved by courts of other developed nations, many of which now review their own nation's extraterritorial actions, including actions affecting foreign nationals. For example in *Cook v. The Queen,* [1998] 2 S.C.R. 597 (Can.), the Canadian Supreme Court suppressed statements that had been made to Canadian authorities by an American citizen in the United States without the Miranda warning required by the Canadian Charter of Rights. Governmental kidnapping abroad of New Zealand citizens, alleged to be criminals, was explicitly rejected by the House of Lords in *Regina v. Horseferry Road Magistrates' Court (Ex Parte Bennett),* [1994] 1 App. Cas. 42 (H.L. 1993). South Africa's abduction of a South African national was struck down in

State v. Ebrahim, 31 I.L.M. 888 (South Africa 1992). And the European Court of Human Rights similarly found it had jurisdiction to review Turkey's extraterritorial action (in Turkish Cyprus) against a Greek-Cypriot, *Loizidou v. Turkey*, (1995) 20 Eur. H.R.Rep. 99 (Eur. Ct. H.R.) (decision on preliminary objections).

Courts have been emboldened to take such jurisdiction in part because of the evolution of a set of human rights principles which are broadly accepted (and are very similar to the principles of the Constitution and the Bill of Rights). Among the most important are the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221,[9] and the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) entered into force for the United States September 8, 1992, subject to Declarations. Decisions under these Conventions are becoming part of a global common law, a body of interpretive jurisprudence on human rights, frequently citing U.S. Supreme Court decisions. Both contain strong statements of the habeas corpus principle.[10]

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[9] This is the Convention adopted by the United Kingdom in 1998 to provide a set of principles for use in judicial review of both executive and Parliament actions, Human Rights Act 1998 (1998 Chapter 42).

[10] *See,* e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms at Article 5 (4) ("Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."); International Covenant on Civil and Political Rights at Article 9 (4) ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the courts

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It is premature to argue to the Court what body of law should be chosen to review the actions of the United States government in this case, since the only issue before the Court at this time is whether to take jurisdiction. But it should be noted that there are several choices available and consistent with international comity principles: the Bill of Rights, a fundamental rights approach as used in the *Insular* cases, or international human rights principles (which can be viewed as a contemporary statement of fundamental rights jurisprudence). The Court has long recognized the need for flexibility in applying Constitutional protections abroad, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J. concurring), and has used due process as its basic source of flexibility for incorporating principles from other areas. Thus, the Court interpreted Fourteenth Amendment due process to incorporate portions of the Bill of Rights and to apply them to states, using its own judgment to decide which provisions of the Bill of Rights should thus be incorporated.[11] Similarly, when reviewing foreign actions of the United States executive, the Court could reasonably interpret the due process provision of the Fifth Amendment to incorporate an appropriate combination of Bill of Rights and international human rights norms. It has

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may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.")

[11] *See*, e.g., *Rochin v. California*, 342 U.S. 165 (1952) (invoking Fourteenth Amendment due process to limit the means usable by police officers to obtain data from an accused); *Palko v. Connecticut*, 302 U.S. 319 (1937) (refusing to extend the Fifth Amendment principle against double jeopardy to limit the right of states to appeal in criminal proceedings).

already considered and cited the body of international human rights law in interpreting Constitutional provisions, *Lawrence v. Texas*, 123 S.Ct. 2472, 2483 (2003) (privacy and homosexual acts); *Atkins v. Virginia*, 536 U.S. 304, 316 n. 21 (2002) (death penalty and mentally-retarded offenders); *Grutter v. Bollinger*, 123 S.Ct. 2325, 2347 (2003) (affirmative action) (Ginsburg, J, concurring). In this case, application of international norms may be required under the habeas corpus statute, which refers to "custody in violation of the laws or Constitution or *treaties* of the United States," 28 U.S.C. § 2241(c)(3) (emphasis added). Even if the international norms were not treated as self-executing in U.S. law, i.e., not directly applicable by courts, the Court could still regard them as declaratory of fundamental rights or as a source to use in interpretation of a due process standard in an international context, just as it uses the Bill of Rights to interpret due process in the domestic context. This leaves the Court a logical basis to avoid application of the international norms in circumstances in which they might be feared to contradict U.S. norms.

B. The contemporary separation of powers doctrine

As recognized in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the reality of anarchy in the international order requires that the executive be free to act internationally in certain ways that would be inappropriate domestically.

> For better or for worse, we live in a world of nation-states in which our Government must be able to "functio[n] effectively in the company of sovereign nations." ... Some who violate our

> laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.

494 U.S. at 275 (citation omitted).

The President's power as commander-in-chief is thus one to which the Court owes deference. The Court is hesitant to restrict the executive's ability to collect intelligence information[12] or to restrict international bargains such as those involved in freeing the hostages in Iran, as approved in *Dames & Moore*. Similarly, it is inappropriate to require the government to pay damages for property destroyed in war, regardless of whether the destruction is foreign or domestic, *Juragua Iron Co., Ltd. v. United States,* 212 U.S. 297 (1909). And, in a slightly different context, it is essential to permit top government leaders to

[12] *See United States v. U.S. Dist. Court for Eastern Dist. of Mich.*, 407 U.S. 297 (1972) (making intelligence information, collected without judicial supervision, inadmissible in a domestic proceeding if collected against a domestic organization with no foreign ties, but making no holding about similar evidence collected against a foreign citizen or government).

be free from the threat of arrest in order that they can carry out their activities.[13]

But the scope of deference is properly limited. The border between the portions of international affairs that remain anarchic and those that can be ordered legally is shifting – and each component shifted into the legally-ordered side, and then recognized by courts as shifted, is a benefit to the international rule of law. For example, the international trade regime created by economic globalization and regulated by the World Trade Organization is now so significant that it would be inappropriate to treat the President's actions in international trade as beyond review, save in those areas where such executive flexibility is clearly envisaged by international or domestic law. Law – rather than international political bargaining – can now be increasingly applied to resolve international disputes

This increased legalization expands on the long standing principle of United States law that Constitutional procedures must be respected in the foreign policy area. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The European Court of Justice has acted several times to ensure that the European Union institutions follow the procedures and competences embodied in their foundation documents in conducting international diplomacy, e.g., Case 281/01, *Commission v. Council (Energy Star Agreement)*, 1 E.C.R. 12049 (2002); Case 1/78, *International Agreement on Natural Rubber*, 1979 E.C.R. 2871. And in *R. v. Secretary of State for Foreign*

[13] *See Case Concerning Arrest Warrant of April 11, 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. 1 (Feb. 14).

Affairs, ex parte *World Development Movement Ltd.*, [1995] 1 All E.R. 611, 1 W.L.R. 386 (Q.B.D. 1994), the British court reviewed a foreign assistance decision for consistency with the authorizing statute.

Among the more legalized areas is the international exercise of criminal enforcement procedures and of treatment of prisoners, reflecting the international human rights principles discussed above as well as international humanitarian law principles such as those embodied in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3116. As suggested by the cases already cited, courts have been willing to apply these principles against their own governments. Courts, including the German Constitutional Court and the Danish Supreme Court, have gone even further to require that their nations participate in international institutions only if these institutions are structured in ways that respect human rights, *Brenner v. European Union Treaty (Judgment of the Maastricht Treaty)*, [1994] 1 C.M.L.R. 57 (Bundesverfassungsgericht 1993); *Re the Application of Wünsche Handelsgesellschaft*, [1987] 3 C.M.L.R. 225 (Bundesverfassungsgericht 1986); *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, [1974] 2 C.M.L.R. 540 (Bundesverfassungsgericht); *Carlsen v. Rasmussen* [1999] 3 C.M.L.R. 854 (Danish Supreme Court 1998).

Deference to the executive in foreign policy actions may require that the executive have significantly greater latitude in the international context than in the domestic context, and the possibility of granting that latitude makes it more feasible for the Court to accept jurisdiction

in foreign policy cases. But only if it does rule that U.S. federal courts have jurisdiction can the Court develop a jurisprudence governing the appropriate latitude that the executive should have. That latitude is properly narrow where individual rights are involved. There are now too many international contexts in which governing law is available – and its application essential to freedom – for the Court to forgo the opportunity for review.

CONCLUSION

The future will almost certainly bring many extraterritorial detentions, criminal investigations, and criminal trials. Rights will be at risk unless these are supervised judicially. For detentions, criminal investigations, or trials of U.S. citizens or within the United States, it is logical and essential that the U.S. Bill of Rights norms apply. For similar actions abroad under U.S. control, the Court should require the executive to provide due process by taking jurisdiction and then applying a combination of the Bill of Rights and of global human rights norms. The Court may offer the executive significant flexibility in recognition of the executive's needs in the foreign policy area – but it can only define that scope of flexibility and maintain its vital Constitutional role in a legal system increasingly affected by globalization if it grants jurisdiction to petitioners. For the executive to keep prisoners in

Guantanamo cannot preempt the operation of the Constitution with respect to those prisoners.

Respectfully submitted,

DAVID D. CARON
Boalt Hall
UNIVERSITY OF CALIFORNIA
AT BERKELEY
Berkeley, CA 94720
510-642-7249

ANNE-MARIE SLAUGHTER
WOODROW WILSON SCHOOL
PRINCETON UNIVERSITY
Princeton, NJ 08544
609-258-4800

JOHN H. BARTON
Counsel of Record
STANFORD LAW SCHOOL
Stanford, CA 94305
650-723-2691

BARRY E. CARTER
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Avenue
Washington, DC 20001
202-662-9322

(31) (30)

Nos. 03-334 & 03-343

Supreme Court, U.S.
FILED
JAN 12 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

—and—

SHAFIQ RASUL, *et al.*,

Petitioners,

—v.—

UNITED STATES, *et al.*,

Respondents,

—and—

GEORGE W. BUSH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE INTERNATIONAL COMMISSION OF JURISTS AND THE AMERICAN ASSOCIATION FOR THE INTERNATIONAL COMMISSION OF JURISTS, AMICI CURIAE, SUPPORTING PETITIONERS

WILLIAM J. BUTLER
Counsel of Record
George B. Adams
A. Hays Butler
International Commission of Jurists
and the American Association for the
International Commission of Jurists
777 United Nations Plaza
New York, New York 10017
(212) 972-0883

Attorneys for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici Curiae consist of the International Commission of Jurists (ICJ) and its American section, the American Association for the International Commission of Jurists (AAICJ). The mission of the ICJ, a non-governmental organization based in Geneva, Switzerland, is to promote the understanding and observance of the rule of law and the legal protection of human rights throughout the world. The ICJ is comprised of 60 jurists of high standing in their own country or at the international level. The Commission meets on a biennial basis and elects an Executive Committee of seven members, which, in turn, meets twice a year. The Executive Committee appoints the Secretary General who is responsible for the daily work of the ICJ Secretariat.

Operations are financed in substantial part by a range of governments. The ICJ also receives funding from private foundations, including several American foundations, as well as private individuals. It enjoys consultative status with the United Nations Economic and Social Council, the African Union and the Council of Europe.

The ICJ promotes the rule of law through the work of its Secretariat in Geneva and its 82 sections and affiliates throughout the world. The AAICJ has been composed over the years of senior members of the American Bar as well as distinguished members of the judiciary and academia. Financially independent from the Secretariat, the AAICJ conducts its own programs according to its own resource base.

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[1] The parties' written consents to the filing of this brief have been filed with the clerk. No counsel for any party has authored this brief in whole or in part, and no person other than amici curiae and their legal counsel made any monetary contribution to its preparation and submission.

These proceedings involve aliens captured abroad during hostilities in Afghanistan and held in United States military custody at the Guantanamo Naval Base in Cuba. The Court of Appeals below affirmed the District Court's dismissal of the proceedings in these dockets in which the parties had filed pleadings which alleged, among other things, that the refusal of the government (i) to inform them of the charges, if any, against them, (ii) to allow them to meet with their families and with counsel, and (iii) to grant them access to any impartial tribunal, military or civilian, to review the basis of their detentions violates the Constitution, federal law and regulations, and treaties of the United States. The ICJ and the AAICJ believe that the decisions by the lower courts in these proceedings raise serious questions concerning the role of the judiciary in protecting the rule of law. Therefore the ICJ and the AAICJ, pursuant to Rule 37, respectfully submit this brief in support of the position advanced by Petitioners Fawzi Khalid Abdullah Fahad Al Odah, *et al.* and Shafiq Rasul, *et al.*

SUMMARY OF ARGUMENT

These proceedings raise the serious question of whether the Courts below have abdicated their essential role in protecting the rule of law in the American system of government. The most basic requirement of the rule of law is access to an independent, competent, and impartial tribunal established by law. At the heart of the concept of "due process of law" is the requirement that any executive detention be subject to judicial review. These principles apply equally when the United States is at peace or at war. While the U.S. military authorities may or may not have an adequate legal basis for detaining the petitioners in Guantanamo Bay, it is essential that the Executive not make that determination alone. While great respect is due to the military during wartime in prosecuting matters

related to the war, there are limits to the discretion to be accorded the military, particularly in areas having to do with the deprivation of liberty which are the traditional province of the judiciary. The military's claims must be subjected to judicial process.

The decision of the Court of Appeals is also inconsistent with basic principles of international law. All major human rights instruments establish standards for the propriety of detention. These standards universally prohibit arbitrary arrest and require the availability of judicial review of any detention.

The decision of the Court of Appeals cannot be squared with these principles. If the Court's interpretation of *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950) were correct, U.S. officials could arrest foreign nationals and, by the simple device of transferring them outside the sovereign territory of the United States, defeat the jurisdiction of the United States Courts.

The arbitrary detention of the detainees at Guantanamo Bay in violation of basic principles of due process and the standards of all major human rights conventions also undermines the rule of law in the international community. Instead of being a champion of the rule of law, the United States has become an example that can be used by other nations to justify the arbitrary detention of their own citizens. Moreover, in addition to undermining the rule of law in other nations, the conduct of the United States government makes it much more difficult for the ICJ and similar human rights organizations to succeed in their mission of promoting basic principles underlying the rule of law in the international community.

ARGUMENT

A. The Decision of the Court of Appeals Is Not Consistent With the Rule Of Law.

The most fundamental guarantee of the liberty of the American people is the rule of law. The *Universal Declaration of Human Rights*[2] emphasizes the critical relationship between the rule of law and the protection of human rights:

> *Whereas* it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

This Court has stressed the central importance of this principle in American democracy from its earliest decisions. As Chief Justice Marshall declared in *Marbury* v. *Madison*, 5 U.S. 137, 163 (1803), "The government of the United States has been emphatically termed a government of laws, and not of men."

Although the rule of law has a number of components, the most basic requirement is access to an impartial, competent and independent tribunal established by law.[3] In his dissent in *Shaughnessy* v. *Mezei*, 345 U.S. 206, 218-228 (1952), in which the Court denied a writ of

[2] U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

[3] In a recent law review article, a U.S. Court of Appeals Judge set forth the following summary of the elements that most scholars believe make up the rule of law: " . . . (1) capacity of legal rules, standards or principles to guide people in the conduct of their affairs; (2) efficacy; (3) stability; (4) *supremacy of legal authority, even over governmental officials (including judges)*; and (5) *instrumentalities of impartial justice (that is, courts that use fair procedures)*. Diane P. Wood, *The Rule of Law in Times of Stress*, 70 *U. Chi. L. Rev.* 455 (2003) (emphasis added).

habeas corpus sought by an alien excluded from the United States on security grounds, Justice Jackson declared that access to the courts of law is one of the most important safeguards in the Constitution:

> Fortunately, it is still startling, in this country to find a person indefinitely in executive custody without accusation of crime or judicial trial . . . Procedural fairness and regularity are of the indispensable essence of liberty. . . Because the respondent had no rights of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? . . . When indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them . . . It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.

Access to the courts of law is equally important when the nation is at peace and at war. As Justice Davis famously declared in *Ex Parte Milligan*, 71 U.S. 2, 120 (1866):

> The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine

> involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during the great exigencies of government. Such a doctrine leads directly to anarchism or despotism . . .

While great respect is due to the military during wartime in matters relating to the prosecution of the war, there are limits to the discretion to be accorded to the military, particularly in areas having to do with the deprivation of liberty which are the traditional province of the judiciary. It is particularly important that any claims of the military be subjected to the judicial process. Justice Murphy explained the critical role of the judiciary in balancing constitutional rights and military discretion in his dissent in *Korematsu* v. *U.S.*, 323 U.S. 214, 233-234 (1944):

> In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgment of the military authorities who are on the scene and have full knowledge of the military facts . . . At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.

These principles are consistent with basic standards of international law. Almost all major human rights conventions establish standards for the propriety of detention. These standards universally prohibit arbitrary arrest and require the availability of judicial review of any executive detention. The *Universal Declaration of Human Rights* declares that: "No one shall be subjected to arbitrary arrest, detention or exile." [4] In addition, Article 10 emphasizes the necessity of access to an independent tribunal,

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[5]

The International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, is equally emphatic in declaring that arbitrary detention is inconsistent with fundamental human rights:

> Everyone has a right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[6]

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[4] Article 9, *Universal Declaration of Human Rights*, adopted by the U.N. General Assembly, Dec. 10, 1948, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

[5] Article 10, *Universal Declaration of Human Rights*, adopted by the U.N. General Assembly, Dec. 10, 1948, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

[6] Article 9, *International Covenant On Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

As a safeguard against arbitrary executive detention, the ICCPR also emphasizes, in a fashion similar to the *Universal Declaration of Human Rights*, the importance of speedy access to an independent and impartial judiciary to determine whether there are legal grounds for the detention:

> Article 9(4): "Anyone deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."
>
> * * * * * * * *
>
> Article 14(1): " . . . In the determination of any criminal charge against him, or of rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[7]

The obligations established by the ICCPR are not intended to be limited to a state's territory. The extraterritorial application of the ICCPR has been recognized by the Human Rights Committee, the body created by the ICCPR to monitor its implementation. In its concluding observations on Israel, the Human Rights Committee stated:

> The Committee is deeply concerned that Israel continues to deny its responsibility to apply the Covenant in the occupied

[7] Articles 9(4) and 14(1), *International Covenant on Civil and Political Rights* (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

> territories. . . The Committee is therefore of the view that . . . the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bank where Israel exercises effective control.[8]

On Nov. 3, 2003, the Human Rights Committee issued an interpretation of the ICCPR which reaffirmed the general extraterritorial application of the rights established under the Covenant:

> State Parties are required by article 2, paragraph 1, to respect and ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party . . . [T]he enjoyment of Covenant rights is not limited to citizens of State Parties but must also be available to all individuals, regardless of

[8] *Concluding Observations of the Human Rights Committee: Israel*, 18 August 1998, U.N. Doc. CCPR/C/79/Add. 93, par. 10. The Human Rights Committee later re-emphasized these views concerning the obligations of Israel in the occupied territories: "The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all of the conduct by the State party's authorities and agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law." *Concluding Observations of the Human Rights Committee: Israel*, 21 August 2003, UN Doc. CCPR/CO/73/ISR, par.11.

> nationality or statelessness, such as asylum seekers, refugees, migrant workers, and other persons, who may find themselves within the territory, or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained . . .[9]

These fundamental human rights are also recognized in many regional human rights conventions. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* provides:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.[10]

The *American Convention on Human Rights*, in the same fashion, prohibits arbitrary detention, and requires that any person detained shall be immediately brought before a judge to determine the lawfulness of his arrest.[11]

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[9] *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Nov. 5, 2003, U.N. Doc. CCPR/C/74/CRP.4/Rev 4, par. 9.

[10] Article 5(4), *European Convention For the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221.

[11] Articles 7(3), (5), and (6), *American Convention on Human Rights*, Nov. 22, 1969, 1144 U.N.T.S. 123.

The international agencies charged with enforcement of these conventions have emphasized that the right to judicial review of executive detention cannot be suspended even during national emergencies. For example, the Inter-American Commission of Human Rights (IACHR) has stated:

> . . . Should a terrorist situation give rise to an emergency that threatens a state's independence or security, that state is nevertheless precluded from suspending certain fundamental aspects of the right to liberty and personal integrity . . . These protections . . . include appropriate judicial review mechanisms to supervise detentions, promptly upon arrest or detention and at appropriate intervals when detention is extended.[12]

In addition, the IACHR has indicated that certain basic rights must be observed when detaining individuals:

> There are components to the right to liberty that can never be denied, including underlying principles that law enforcement authorities must observe in making an arrest even during an emergency . . . These include the requirement that the grounds and procedures for the detention be prescribed by law, the right to be informed of the reasons for the detention, as well as certain guarantees against prolonged *incommunicado* or indefinite detention, including access to legal counsel, family

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[12] *Report on Terrorism and Human Rights*, O.A.S. Doc. OEA/ Ser. L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, par. 139.

> and medical assistance following arrest, [and] prescribed and reasonable limits upon the length of preventive detention . . . [13]

The decision of the Court of Appeals is contrary to the rule of law as enunciated in both these international conventions and basic principles of American jurisprudence. Relying principally on *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the Court of Appeals held that "constitutional rights. . . are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens" and therefore that, "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees." *Odah, et al.* v. *United States*, 321 F.3d 1134, 1140-1141 (D.C. Cir. 2003). If the Court's interpretation of *Johnson* v. *Eisentrager* were correct, U. S. officials could arrest foreign nationals and, by the simple device of transferring such prisoners to a place of detention outside the sovereign territory of the United States, defeat the jurisdiction of the United States Courts to review the legality of their detention. The U.S. Executive could arbitrarily hold such individuals in detention with no accountability to any court of law. The ICJ and the AAICJ do not assert that the U.S. Executive may not have an adequate legal basis for holding the individuals involved in this proceeding in detention. Rather, they contend that the rule of law requires that such determination must be made by a court of law and not by the Executive alone. The balancing of the government's military claims against the claims of the detainees is constitutionally committed to the Courts and not to the Executive.

[13] *Report on Terrorism and Human Rights*, O.A.S. Doc. OEA/ Ser. L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, par. 127.

B. The Decision of the Court of Appeals Undermines the Mission of the ICJ And Similar Human Rights Organizations in Promoting the Rule of Law.

Historically, the United States' traditions of the rule of law, human rights, and democracy have been respected in the international community. It has always been – and still is - the proud boast of the United States that it stands for these principles in the community of nations. For example, the National Security Strategy of the United States, issued in September, 2002, states:

> In pursuit of our goals, our first imperative is to clarify what we should stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere . . . America must stand firmly for the nonnegotiable demands of human dignity: the rule of law; [and] limits on the absolute power of the state . . . We will champion the cause of human dignity and oppose those who resist it.

The decision of the Court of Appeals that the rule of law does not apply to the detainees of Guantanamo Bay diminishes the reputation of the United States as a champion of the rule of law. There are already disturbing signs that other nations have begun to use the example of the United States to justify arbitrary detention of their citizens. For example, Malaysia's Law Minister has justified the detention of militants without trial stating that its practice was "just like the process at Guantanamo Bay." Sean Yoong, *Malaysia Slams Criticism of Security Law Allowing Detention Without Trial*, Assoc. Press, September 17, 2003. The minister further indicated that he "put the

equation with Guantanamo Bay just to make it graphic to you that this is not simply a Malaysian style of doing things." Egypt, Cameroon, and a number of other African countries have also moved to detain individuals perceived as threats to national security. "The insistence by the Bush administration on keeping Taliban and Al Qaeda captives in indefinite detention in Guantanamo Bay, instead of jails in the United States – and the White House's preference for military tribunals over regular courts – helps create a free license for tyranny in Africa." Shehu Sani, *U.S. Actions Send a Bad Signal to Africa: Inspiring Intolerance*, *Int'l Herald Trib.*, Sept. 15, 2003.

When the United States deprives the Guantanamo Bay detainees of their liberty without due process of law, it undermines the rule of law in the international community and makes it much more difficult for the ICJ and similar human rights organizations to succeed in their mission of promoting basic principles underlying the rule of law. For example, the ICJ engages in numerous efforts to carry out this mission. It intervenes with governments in particular cases of harassment of jurists. It sends observers to trials which may affect judicial independence or in which lawyers are targeted. It coordinates fact-finding missions to countries where the function of the judiciary is under serious threat and also publishes country reports documenting cases of harassment and persecution of judges and lawyers throughout the world.

In promoting the rule of law through programs such as these, the ICJ and similar human rights organizations should always be able to point to the United States as an example of a nation that respects both the rule of law and the role of the judiciary in safeguarding the rule of law. The holding of the detainees at Guantanamo Bay in arbitrary detention – without access to the courts and counsel – deprives the world of such an example.

CONCLUSION

The United States is a nation founded upon a tradition of individual liberty and democracy. The most significant safeguard of individual liberty is the rule of law. It is the responsibility of the judiciary in the American system of government to assure the survival of the rule of law. It is, therefore, particularly important that this Court reaffirm the role of the judiciary in safeguarding the rule of law both when the country is at peace and at war. The judgment below should be reversed.

Respectfully Submitted,

William J. Butler
Counsel of Record
George B. Adams
A. Hays Butler
International Commission of Jurists
American Association for the
International Commission of Jurists
777 United Nations Plaza
New York, N.Y. 10017
(212) 972-0883

Attorneys for Amici Curiae

Dated: January 9, 2004

(32) (31)

Nos. 03-334, 03-343

Supreme Court, U.S.
FILED
JAN 12 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SHAFIQ RASUL, et al.,

Petitioners,

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, et al.,

Respondents.

FAWZI KHALID ABDULLAH
FAHAD AL ODAH, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District of Columbia Circuit**

BRIEF OF *AMICUS CURIAE* OMAR AHMED KHADR BY HIS NEXT FRIEND FATIMA EL-SAMNAH IN SUPPORT OF PETITIONERS

DENNIS EDNEY
EDNEY, HATTERSLEY & DOLPHIN
#1970, 10123 – 99th Street
Edmonton, AB, T5J 3H1
Telephone: (780) 423-4081
Facsimile: (780) 425-5247

NATHAN WHITLING
PARLEE MCLAWS LLP
#1500, 10180 – 101 Street
Edmonton, AB, T5J 4K1
Telephone: (780) 423-8658
Facsimile: (780) 423-2870

JOHN A. E. POTTOW
Counsel of Record
UNIVERSITY OF MICHIGAN
LAW SCHOOL
625 South State Street
Ann Arbor, MI, 48109
Telephone: (734) 647-3736
Facsimile: (734) 764-8309

Attorneys for the Amicus Curiae Omar Ahmed Khadr

January 12, 2004

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OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

The *amicus curiae* Omar Ahmed Khadr ("Omar") is one of several children and the only Canadian citizen currently detained in Guantánamo Bay, Cuba. Like the Petitioners, Omar is virtually *in communicado* and his grandmother Fatima El-Samnah acts as his Next Friend.

Reports indicate that Omar was first captured in Afghanistan in July of 2002 when he was fifteen years old. Since that time, Omar has been forcibly separated from his mother, his siblings, and his grandparents. There is no present indication of an intention to reunite Omar with his family.

It is known that Omar sustained serious injuries at the time of his capture and that he experiences ongoing health concerns. He has lost approximately ninety percent of the vision in his left eye and is also believed to be recovering from bullet wounds.

In approximately the late fall of 2002, Omar was taken from Bagram, Afghanistan, and flown across the globe to Guantánamo Bay, Cuba. As a consequence of Omar's plane having landed some ninety miles short of the coast of Florida, he has not been brought before any independent judicial authority for a determination of his legal status, nor has he been advised of any formal charges or allegations raised against him. Although Canadian intelligence officials have been permitted to question

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or his counsel, make a monetary contribution to the preparation or submission of this brief.

Omar on at least one occasion, he has been accorded visits from neither his family nor independent counsel.

Omar wishes to exercise his fundamental right to challenge the legality of the deprivation of his liberty before a court of competent, independent and impartial authority, and to a prompt decision thereon. He submits this brief, through his Next Friend, in support of Petitioners' position seeking reversal of the decision of the Court of Appeals.

SUMMARY OF ARGUMENTS

The *amicus curiae* Omar Ahmed Khadr is mindful of Rule 37 of the *Rules of the Supreme Court of the United States*, as well as the fact that many other parties and *amici* have filed briefs before this Court in these appeals. As such, these submissions are limited to two topics arising from the *amicus curiae*'s status as a child and as a Canadian national.

The *amicus curiae* refers this Court to the principles of international law that require states to protect the rights of children deprived of their liberty. While children also enjoy protection under such generally applicable instruments as the *Geneva Conventions*, instruments such as the United Nations *Convention on the Rights of the Child* emphasize the need to accord special protection to children. The *amicus curiae* contends that in deciding the issues raised in these appeals, the Court should interpret the Constitution in a manner consistent with the fundamental principles of international law contained in these instruments.

As a Canadian, and to assist this Court in confronting new and difficult issues recently addressed by sister common law jurisdictions, the *amicus curiae* refers this Court to recent decisions of the Supreme Court of Canada. These decisions, while of course not binding upon this Court, may prove instructive. They address the extent to which the Constitution of Canada may be applied to the conduct of Canadian government officials committed outside Canada's geographic boundaries. It is submitted that a similar balancing test to that enunciated by the Supreme Court of Canada in *R. v. Cook*, [1998] 2 S.C.R. 597, ought to be adopted by this Court in these appeals. The test in *Cook* – which may be invoked by Canadian nationals and foreigners alike – provides that the domestic courts of Canada may apply the Constitution beyond Canada's sovereign territory where: (1) the conduct in question is that of Canadian government officials, and (2) the application of the Constitution will not interfere with the sovereign authority of the foreign state and thereby generate an objectionable extra-territorial effect.

In sum, the *amicus curiae* submits that this Court ought to interpret the Constitution in a manner consistent with the principles of international law and consistent with the decisions of other nations whose government actors travel the world. This Court should recognize jurisdiction on the part of the domestic courts of the United States to review the conduct of United States government actors in Guantánamo Bay, and reverse and remand these matters for further proceedings on the merits.

ARGUMENT

I. The Rights of Children Under International Law

The *amicus curiae* supports and adopts the submissions of the Petitioners and *amici* regarding the applicability of customary international law as domestic law and the use of international law as an aid in constitutional interpretation.

The Supreme Court of Canada has recently emphasized the importance of standards and principles of international law in ensuring the protection of children. In the concurring reasons of L'Heureux-Dubé, Gonthier and Bastarache JJ. in *R. v. Sharpe*, [2001] 1 S.C.R. 45, it was stated:

> The protection of children from harm is a universally accepted goal. While this Court has recognized that, generally, international norms are not binding without legislative implementation, they are relevant sources for interpreting rights domestically. . . .
>
> [A] balancing of competing interests [in constitutional interpretation] must be informed by Canada's international obligations. The fact that a value has the status of an international human right is indicative of the high degree of importance with which it must be considered. . . .
>
> Both legislators abroad and the international community have acknowledged the vulnerability of children and the resulting need to protect them. It is therefore not surprising that the *Convention on the Rights of the Child* has been ratified or acceded to by 191 states as of January 19, 2001, making it the most universally accepted human rights instrument in history.

Id. at 140-41.

As noted in *Sharpe*, *supra*, the most significant instrument regarding the rights of children under international law is the Convention on the Rights of the Child, U.N.G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 2 September 1990 (the "CRC"). Although never adopted as domestic legislation by the Parliament of Canada, the provisions of the CRC were nevertheless applied by the Supreme Court of Canada as an interpretive aid to federal legislation in the case of *Baker v. Canada* (*Minister of Employment and Immigration*), [1999] 2 S.C.R. 817. In that case, the Court interpreted provisions of immigration statutes relating to families in removal proceedings in a manner consistent with the CRC.

The United States and Somalia are the only two nations not to have ratified the CRC. However, on February 16, 1995, the United States signed the CRC, thereby affirming its obligation "to refrain from acts which would defeat the object and purpose of [the] treaty," Vienna Convention on the Law of Treaties, U.N.T.S., vol. 1155, p. 331, *entered into force* 27, Art. 18. Additionally, on January 23, 2003, the United States ratified two Optional Protocols to the CRC, namely the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N.G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (2000), *entered into force* 12 February 2002, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, U.N.G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (2000), *entered into force* 18 January 2002.

More importantly, in light of its near-universal acceptance, the CRC has been recognized and applied by the courts of the United States as customary international law. For example, in *Beharry v. Reno*, 183 F. Supp.2d 584, 600 (E.D.N.Y. 2002), rev'd on other grounds, *Beharry v. Ashcroft*, 329 F.3d 51 (2003), the District Court for the Eastern District of New York noted the widespread acceptance of the CRC: "This overwhelming acceptance is strong reason to hold that some CRC provisions have attained the status of customary international law." And in *Sadeghi v. I.N.S.*, 40 F.3d 1139, 1147 (CA10 1994), it was noted that "The Convention on the Rights of the Child has been ratified by 166 nations, including Iran! Moreover, it has attained the status of customary international law."

Article 37 of the CRC provides:

States Parties shall ensure that:

. . . .

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

. . . .

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 37 of the CRC codifies longstanding and widely-accepted principles of law. Moreover, the rights enshrined in the CRC apply to "every child" regardless of citizenship or reasons for detention. These same principles are embodied in the International Covenant of Civil and Political Rights, U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976 (the "ICCPR"), which both the United States and Canada have signed and ratified. Article 9.4 of the ICCPR provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

It has been widely recognized throughout the world that the indefinite detention without charge of the *amicus curiae* and other children by the Respondents constitutes a "flagrant breach" of international law. In the Parliamentary Assembly of Europe's Resolution No. 1340 (2003) (Adopted June 26, 2003), it was resolved:

1. The Parliamentary Assembly:

> . . . .
>
> ii. notes that a number of children are being held in Guantánamo Bay, including a "handful" of children between 13 and 15 years of age transferred from the Bagram Air Base in 2003, and a 16-year old Canadian national transferred at the end of 2002;
>
> iii. believes that children should only be detained as a last resort and that they require special protection; that the continuing

> detention of these young people is a most flagrant breach of the United Nations Convention on the Rights of the Child.

The protection of children from harm is a universally accepted goal and a fundamental tenet of both international law and domestic law. The Constitution should be interpreted in a manner requiring executive authority to be exercised in a manner consistent with these most fundamental of principles. An interpretation contrary to that advanced by the Petitioners in this case would entail a conclusion that the United States has acted in violation of international law – a result which must be avoided where an alternative conclusion is available.

II. The Extra-Territorial Application of Constitutional Law

Between the United States and Canada lies the longest undefended border in the world. Each nation shares an interest in ensuring the fair treatment of its citizens by its neighbor's government, and each has a proud constitutional tradition of recognizing basic human rights. In assessing the issues in this case, this Court ought to consider and adopt the jurisprudence recently developed by the Supreme Court of Canada in relation to the treatment of U.S. citizens by Canadian government officials outside Canada's sovereign territory.

A. *United States v. Verdugo-Urquidez* and *R. v. Terry*

In addition to *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the decision of the Court of Appeals below was based in large measure upon this Court's decision in

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). In *Verdugo-Urquidez*, federal agents of the United States had arranged to conduct searches of defendant Verdugo-Urquidez's residences in Mexico. The searches were authorized by the Director General of the Mexican Federal Judicial Police, and carried out in concert with Mexican officials. Under those circumstances, this Court held that Verdugo-Urquidez had no right to challenge the constitutionality of the searches because the Fourth Amendment did not apply extra-territorially to the conduct that occurred in Mexico.

A decision similar to *Verdugo-Urquidez* was rendered by the Supreme Court of Canada in *R. v. Terry*, [1996] 2 S.C.R. 207. In that case, defendant Terry had been apprehended by American police officers in Santa Rosa, California, pursuant to an extradition warrant issued by a federal district court. At the request of Canadian police officers, the Santa Rosa police interviewed Terry and obtained incriminating statements from him. Following his extradition to Canada, Terry sought to have his statements excluded by operation of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Writing for the unanimous Supreme Court of Canada, Justice McLachlin (as she then was) held that Terry could not challenge the constitutionality of the interview since the *Charter* did not apply extra-territorially to the conduct of the Santa Rosa police. This was so despite the fact that the interview had been conducted at the behest of Canadian police officers. Noting the historical pedigree of territorial jurisdiction (and implicitly acknowledging the value of considering the case law from sister jurisdictions), Justice McLachlin held that applying the *Charter* to the conduct of the Santa Rosa police would offend traditional notions of sovereignty:

> Such a finding would run counter to the settled rule that a state is only competent to enforce its laws within its own territorial boundaries. As Marshall C.J. put it in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), at p. 136, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."
>
> *Id.* at 215.

B. *R. v. Cook*

In the subsequent case of *R. v. Cook*, [1998] 2 S.C.R. 597, Cook, a U.S. citizen, had been arrested in New Orleans by U.S. officials pursuant to a warrant issued in response to a Canadian extradition request for a murder committed in Canada. Canadian detectives attended in New Orleans and interviewed Cook about the murder. Following his extradition, Cook applied to have his statement excluded by operation of the *Charter*. The Crown argued that *Terry* was controlling precedent and had previously established that the *Charter* did not apply to conduct committed outside the geographic boundaries of Canada.

In a 5-2 decision, the Supreme Court of Canada noted that *Terry* had addressed an exercise of legal authority by the government officials of a foreign nation; the interview in *Terry* had been conducted by American police officers, and the fact that they were acting at the behest of (and conceivably as agents for) Canadian police officers did not change that fact. By contrast, in *Cook*, the interview was conducted by Canadian police officers themselves (albeit in

United States territory). This consideration was found to be decisive requiring *Terry* to be distinguished.

Having declined to follow *Terry*, the Court in *Cook* enunciated a new approach to the extra-territorial application of the Canadian *Charter*. The domestic courts of Canada may now apply the *Charter* beyond Canada's sovereign territory where a two part test is satisfied: (1) the conduct in question was that of Canadian government officials, and (2) the application of the *Charter* will not interfere with the sovereign authority of the foreign state and thereby generate an objectionable extra-territorial effect. *Id.* at 616, 625, 626, 627.

The Supreme Court of Canada's decision in *Cook* was informed by well established principles of international law and comity. The court noted that it was consistent with established principles of international law for the domestic courts of Canada to assert jurisdiction on the basis of the nationality of the police officers who had conducted the interview. The following passage by Oscar Schachter in INTERNATIONAL LAW IN THEORY AND PRACTICE (1991), at p. 254 was adopted:

> It had long been accepted that a State was entitled to apply its legislative (or prescriptive) authority to events and persons within its territory and to its nationals outside of the country. "Territoriality" and "nationality" were referred to as "bases" of jurisdiction and functioned as criteria of permissible authority. Territoriality is generally considered the normal basis of jurisdiction; nationality more exceptional, but always accepted in international relations.
>
> *Id.* at 618.

The court in *Cook* also noted that jurisdictional competence on the basis of the nationality of the police officers was an incident of Canada's sovereign equality and independence:

> The fundamental bases for the exercise of jurisdiction by a State are rooted in two aspects of the modern concept of the State itself: defined territory and permanent population. In principle, a State has jurisdiction over all persons, property and activities in its territory; a State also has jurisdiction over its nationals *wherever they may be*.
>
> *Id.* at 618. (Quoting Bernard H. Oxman, *Jurisdiction of States*, vol. 10, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (1987), at p. 279, with emphasis added by the court.)

The Attorney General of Canada had been granted intervener status in *Cook* and had argued that the application of the *Charter* to the New Orleans interview would ultimately confer *Charter* rights upon every person in the world. The Supreme Court of Canada was not persuaded by these arguments. At paragraph 53 the Court noted that the *Charter* will only apply extra-territorially under those exceptional circumstances where the two-part test is met. *Id.* at 628-29.

C. Adoption and Application to the Circumstances of this Case

The *amicus curiae* respectfully submits that this Court ought to adopt an approach to the extra-territorial application of the Constitution similar to that established by the Supreme Court of Canada in *R. v. Cook*. This approach has been developed in the context of today's

global economy where people and goods travel across borders at rates previously unimagined. It is carefully crafted to strike an appropriate balance between the basic human rights of the individual and the need to avoid interference with the sovereign legal authority of foreign governments.

As was the case in *Terry*, *supra*, this Court's previous decision in *Verdugo-Urquidez* addressed conduct that was specifically authorized and carried out by Mexican government authorities in accordance with Mexican law. Under these circumstances, the application of the Fourth Amendment to the searches at issue would have constituted an interference with the sovereign authority of Mexico and thereby generated an objectionable extra-territorial effect, *i.e.*, it would have failed the *Cook* test.

By contrast, in the present case, there can be no serious suggestion that the application of the laws of the United States to the government officials who are currently detaining the Petitioners and *amicus curiae* would generate an objectionable extra-territorial effect. The government of Cuba, while technically retaining "ultimate sovereignty" under the terms of the lease of Guantánamo Bay, does not purport to exercise legal authority over the persons detained therein. In the absence of such an objectionable extra-territorial effect, it is appropriate for this Court to distinguish its previous decision in *Verdugo-Urquidez*.

III. Conclusion

It is submitted by the *amicus curiae* Omar Ahmed Khadr that the Constitution must be interpreted in a manner consistent with the universally recognized goal to protect children from abuse and arbitrary detention.

With respect to the extra-territorial application of the Constitution, the nationality of the government officials who are arbitrarily detaining the Petitioners and *amicus curiae* is a valid basis for an exercise of jurisdiction under international law, and should be so as a matter of domestic constitutional law provided that no impermissible infringement on sovereignty is generated. Other constitutional democracies, sharing traditional common law notions of sovereignty, have so held.

For the foregoing reasons, this Court should reverse and remand these appeals for further proceedings consistent with such an approach.

Respectfully submitted,

DENNIS EDNEY
EDNEY, HATTERSLEY & DOLPHIN
#1970, 10123 – 99th Street
Edmonton, Alberta, T5J 3H1
Telephone: (780) 423-4081
Facsimile: (780) 425-5247

JOHN A. E. POTTOW
Counsel of Record
UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109
Telephone: (734) 647-3736
Facsimile: (734) 764-8309

NATHAN WHITLING
PARLEE MCLAWS LLP
#1500, 10180 – 101 Street
Edmonton, Alberta, T5J 4K1
Telephone: (780) 423-8658
Facsimile: (780) 423-2870

Attorneys for the Amicus Curiae

Supreme Court, U.S.
FILED
JAN 13 2004
OFFICE OF THE CLERK

(12) (12)

No. 03-334 & 03-343

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v.

UNITED STATES OF AMERICA, ET AL, *Respondents*

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF INTERNATIONAL LAW EXPERT IN SUPPORT OF THE PETITIONERS

JAMES R. KLIMASKI*
KLIMASKI & ASSOCIATES, P.C.
400 K Street, N.W.
Washington, DC 20005
(202) 296-5600

CURTIS F.J. DOEBBLER
JOHN MITCHELL
CHRISTINE CHINKIN

*Counsel of Record

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JAMES R. KLIMASKI*
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400 K Street, N.W.
Washington, DC 20005
(202) 296-5600

CURTIS F.J. DOEBBLER
JOHN MITCHELL
CHRISTINE CHINKIN

*Counsel of Record

13 January 2004

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INTEREST OF AMICUS CURIAE[1]

Amici represented in this brief have considerable experience and expertise in international human rights law. They include members of the Bar of the United States Supreme Court with experience in cases involving international law, a senior professor of international law, and a legal representative of the prisoners in Guantánamo Bay, Cuba in a case before the Inter-American Commission on Human Rights. All *Amici* have demonstrated interests in ensuring respect for international law.

The ruling of the United States Court of Appeals for the District of Columbia that is challenged in this case concerns the basic human rights of the prisoners in Guantánamo Bay Naval Base in Cuba. The Court's decision on this Petition for a Writ of Certiorari will affect the basic human rights of both those persons named in the Petition before the Court as well as those who are not, but who are in the same intolerable conditions.

[1] In accordance with Rule 37.6 it is stated that no monetary contributions were made for the preparation or submission of this brief and that no counsel for any party to this case participated in the authoring of this brief.

SUMMARY OF ARGUMENTS

The Court should find that the United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay Naval Base in Cuba.

The United States courts have a duty to exercise jurisdiction over cases in which foreign nationals who have been captured abroad in connection with hostilities are detained by United States military forces when those persons claim that their internationally protected human rights have been violated.

This duty is a consequence of the United States' obligation to provide any person who reasonably claims that his or her internationally protected human rights have been violated access to a court to determine the validity of the claim.

This duty is based on treaties that the United States has ratified and is part of customary international law that creates legal obligations for the United States.

Violation of this duty provides all other states a justification for actions taken against the United States in response to its violation of international law.

INTRODUCTION

This *Amicus* Brief presents arguments based on international law. This law is relevant to the Court because the United States government has unequivocally represented that it will abide by it and this Court has long held that "[i]nternational law to be part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquette Habana and The Lola*, 175 U.S. 667, 700 (1900).

This *Amicus* Brief takes into account the Brief *Amicus Curiae* of the Human Rights Institute of the International Bar Association (hereinafter *Amicus Curiae* Brief of the IBA) in Support of Petitioners. The *Amicus Curiae* Brief of the IBA focuses on the issue of attribution of state responsibility under international law and rights to fair trial and not to be subject to arbitrary arrest and detention. This *Amicus* Brief focuses on the more general right to access to a court when international human rights law is violated and the consequences that may follow such a violation.

Although Amicus Curiae believe that Petitioners' claims, raised in their initial petition for *habeas corpus* are meritorious, this brief does not comment on the substantive claims. To invoke the basic rights considered herein it is only necessary for Petitioners to raise an arguable claim, which it is clear they have done.

In accordance with the Rules of the Court, this *Amicus* Brief does not repeat the arguments in the *Amicus Curiae* Brief of the IBA, but rather develops upon them and provides the Court new arguments that are of crucial relevance to the determination of this matter. We thus consider this *Amicus*

Brief to assist the Court in understanding the international responsibility of the United States that requires the United States courts to take jurisdiction in this case.

ARGUMENTS

I. THE UNITED STATES COURTS HAVE A DUTY TO EXERCISE JURISDICTION OVER CASES IN WHICH FOREIGN NATIONALS WHO HAVE BEEN CAPTURED ABROAD IN CONNECTION WITH HOSTILITIES ARE DETAINED BY THE UNITED STATES AND CLAIM THAT THEIR INTERNATIONALLY PROTECTED HUMAN RIGHTS HAVE BEEN VIOLATED

The duties of states are derived from the concept of state responsibility. As a highly qualified international legal publicist has recently pointed out, state responsibility for violations of international law is a general principle of international law. Ian Brownlie, *Principles of International Law* 420 (6th ed. 2003).

Generally where no state responsibility exists, a state need not act in a particular manner and has discretion as to its international actions because it is a sovereign entity. However, when, by virtue of treaty or custom, an international obligation exists limiting the remit of state action, that state is legally bound to act within the constraints of international law.

The international law of state responsibility has developed over hundreds of years. Although it is not fully codified, the work of the United Nation's International Law Commission (ILC) has been of great value in establishing its consensually accepted parameters. These articles reflect the consensus of many of the leading international lawyers who

have been brought together to study, develop, and prepare for codification the rules of international law. The United States has participated in these deliberations and is currently represented Mr. Michael J. Matheson on the International Law Commission.

In 2001 the International Law Commission adopted the Articles on Responsibilities of States for Internationally Wrongful Acts (ILC Articles). U.N.G.A. Res. No. 83, UN GAOR, 56th Sess., Supp., No. 10 and Corrigendium, U.N. Doc. A/56/83 (2001). These articles reflect the basic rules concerning state responsibility that have been agreed by the consensus of the international community's leading legal experts.

The foremost principle agreed to by the International Law Commission is that reflected in article 1 of the ILC Articles, namely: "Every internationally wrongful act of a State entails the international responsibility of that State."

Article 2 of the ILC Articles further states that to establish the existence of an internationally wrongful act it is necessary to identify an act that is attributable to a state and a corresponding obligation that is violated by the act. *Id.* at art. 2.

* * *

In this case there can be no doubt that the act complained of—denying Petitioners access to a court to determine the legality of their detention—has been committed by an organ of the government of the United States. The United States courts have denied Petitioners this access.

That national courts can act in a manner that incurs the responsibility of a state is a well accepted principle of international law and has been reiterated by the International Court of Justice in *Difference Relating to Immunity from*

Legal Process of a Special Rapporteur of the Commission on Human Rights, *I.C.J. Reports* 62 (1999), at p. 87, para. 62, where a national court's allowance of an action against a United Nations representative with immunity under international law was found to be a violation of international law. The act of denying Petitioners access to a court of law is therefore clearly attributable to the United States.

The legal obligation to ensure Petitioners access to a court of law to determine the legality of their arrest is equally an entrenched principle of both treaty and customary international law that is binding on the United States. The specific contours of this legal obligation are identified in sub-sections A and B, below. It is important to reiterate at this point, however, that the legal constraints on a states' action may derive from either treaties or customary international law. A violation of either type of obligation gives rise to the international responsibility of the state.

Finally, as the *Amicus Curiae* Brief of the IBA has indicated, state responsibility for violation of basic human rights attaches to actions perpetrated by actors under the control or acting on behalf of the United States and is without prejudice to the location, legal status, nationality, race, religion, ethnic background, or any other similar feature of the victim of a violation. (*Amicus Curiae* Brief of the IBA at 14; *also see In the Matter of the Detainees in Guantánamo Bay, Cuba*, "Response to a Request for Precautionary Measures," Inter-Am.C.H.R. (March 13, 2002) in which the Commission decided concerning the rights of the same Petitioners now before this Court that "[t]he determination of a state's responsibility for violations of the international human rights of a particular individual turns not on that individual's nationality or presence within a particular geographic area, but rather on whether, under

the specific circumstances, that person fell within the state's authority and control"). *Id.*

A. THE DUTY TO EXERCISE JURISDICTION IS BASED ON TREATIES THAT THE UNITED STATES HAS RATIFIED

Article 2, paragraph 3 of the International Covenant of Civil and Political Rights (ICCPR), U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976, requires that the United States provide any person claiming that their human rights have been violated an effective remedy. Failure to afford such access to a court of law to challenge one's detention constitutes a violation of the international obligation in article 2, paragraph 3 of the ICCPR as well as a violation of due process rights. This treaty has been ratified by the United States.

Elaborating upon the state's responsibility for ensuring the human rights in the ICCPR in times of the gravest emergency, the United Nations Human Rights Committee has stated "that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency." UN Human Rights Committee, General Comment No. 29 on States of Emergency (Art. 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) at para. 16. This respect requires not only that the rights of due process be protected, but also that "the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished." *Id.*

When a state party to the ICCPR has denied an individual access to a court to determine whether or not his or her human rights have been violated the Human Rights Committee has held that this constitutes a violation of the

article 2, paragraph 3. *See, for example, Currie v. Jamaica*, Communication No. 377/1989, U.N. Doc. CCPR/C/50/D/377/1989 (1994) at para. 13.3 and 13.4 (expressing the view that the absence of legal aid is a bar to effective access to a court that violates article 2, paragraph 3) and *Luyeye v. Zaire*, 38th Sess. U.N. Doc. A/38/40, p. 187, annex XIX, REPORT OF THE HUMAN RIGHTS COMMITTEE, GAOR, 43rd Sess., Supp. No. 40, U.N. Doc. A/43/40, Annex VII.C (expressing the view that article 2, paragraph 3 is violated when a person is held for nine months during a state of emergency and denied access to the courts, even if he can communicate an appeal to the executive authorities).

The ICCPR does contain an express provision in article 4 that allows states to derogate from the articles concerning access sot a court and fair trial in cases of emergency. Such derogations, however, must be expressly invoked and are invalid unless the strict criteria in article 4 have been followed. The United States took no steps to invoke article 4 and did not derogate from these provisions.

The United States is also member of the Organization of American States (OAS) by virtue of its ratification the Charter of the Organization of American States, OAS Treaty Series, Nos. 1-C and 61, U.N.T.S., No. 1609, Vol. 119, *entered into force* 30 April 1948. As an OAS member state, the United States must respect the basic human rights of all persons under its jurisdiction. *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Inter-American Court, Advisory Opinion No. OC-10/89 (14 July 1989) at paras. 43-46 and *James Terry Roach and Jay Pinkerton v. United States*, Inter-American Commission on Human Rights, Case No. 9647 (22 June 1977) at paras. 46-49.

The human rights that must be respected in the Inter-American system are determined by the organs of the OAS, but the duty to respect these rights is based on the Charter of the OAS. This relationship has been succinctly described by the Inter-American Court in the case concerning *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (Ser. A) No. 10 (1989) (14 July 1989) at paras. 39-43:

> 39. The Charter of the Organization refers to the fundamental rights of man in its Preamble ((paragraph three) and in Arts. 3(j), 16, 43, 47, 51, 112 and 150; Preamble (paragraph four), Arts. 3(k), 16, 44, 48, 52, 111 and 150 of the Charter revised by the Protocol of Cartagena de Indias), but it does not list or define them. The member states of the Organization have, through its diverse organs, given specificity to the human rights mentioned in the Charter and to which the Declaration refers.
>
> 40. This is the case of Article 112 of the Charter (Art. 111 of the Charter as amended by the Protocol of Cartagena de Indias) which reads as follows:
>
> > There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.
> >
> > An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.
>
> Article 150 of the Charter provides as follows:
>
> > Until the inter-American convention on human rights, referred to in Chapter XVIII (Chapter XVI of the

Charter as amended by the Protocol of Cartagena de Indias), enters into force, the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights.

41. These norms authorize the Inter-American Commission to protect human rights. These rights are none other than those enunciated and defined in the American Declaration. That conclusion results from Article 1 of the Commission's Statute, which was approved by Resolution No. 447, adopted by the General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979. That Article reads as follows:

> 1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.
>
> 2. For the purposes of the present Statute, human rights are understood to be:
>
> a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;
>
> b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

Articles 18, 19 and 20 of the Statute enumerate these functions.

> 42. The General Assembly of the Organization has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS. For example, in Resolution 314 (VII-O/77) of June 22, 1977, it charged the Inter-American Commission with the preparation of a study to "set forth their obligation to

> carry out the commitments assumed in the American Declaration of the Rights and Duties of Man." In Resolution 371 (VIII-O/78) of July 1, 1978, the General Assembly reaffirmed "its commitment to promote the observance of the American Declaration of the Rights and Duties of Man," and in Resolution 370 (VIII-O/78) of July 1, 1978, it referred to the "international commitments" of a member state of the Organization to respect the rights of man "recognized in the American Declaration of the Rights and Duties of Man."....
>
> 43. Hence it may be said that by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

The Inter-American Commission has held that the right to access to a court in article XVIII reflected in the American Declaration of the Rights and Duties of Man was violated when the United States interdicted Haitian refugees and held them in the Guantánamo Bay Naval Base in Cuba denying them access to the United States courts. *The Haitian Centre for Human Rights et al. v. United States*, Case 10.657, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1996) at para. 180. *Also see Palacios v. Argentina*, Case 10.194, Inter-Am.C.H.R., OEA/Ser.L/V/II.106 Doc. 3 rev. (2000) at paras. 56-58.

The Inter-American Court has also repeatedly held that the responsibilities incumbent upon states of the OAS include the duty not to suspend judicial guarantees, such as

habeas corpus and other guarantees of access to courts. *See Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8 (30 January 1987) and *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (Ser. A) No. 9 (6 October 1987). These guarantees may never be suspended even temporarily because they are essential to the protection of other human rights, including human rights such a prohibition of torture that has the non-derogable character of *jus cogens*. *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8 (30 January 1987) at para. 27.

The interpretation of the Charter of the OAS by the authoritative bodies of the Inter-American Commission on Human Rights and Inter-American Court of Human Rights clearly indicate that the Charter of the OAS includes a legal obligation providing all persons under the authority of the United States with the right of access to the United States courts. Therefore, the failure of the United States courts to respect this right constitutes an internationally wrongful act giving rise to state responsibility.

* * *

Furthermore, the United States has signed, although it has not ratified, the American Convention on Human Right, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* 18 July 1978. In doing so, it has undertaken not to act in any way that would defeat the object and purpose of the American Convention. By denying Petitioners the right to be heard by a United States court in matters concerning alleged violations of their most basic human rights, the United States subjects the object and purpose of the American Convention on Human Rights to the complete discretion of the United States government and thereby renders its ineffective as an international legal instrument. Again, therefore, the failure

of the United States courts to provide Petitioners a remedy constitutes an internationally wrongful act giving rise to state responsibility.

B. THIS DUTY IS PART OF CUSTOMARY INTERNATIONAL LAW

The obligation to provide individual access to courts of law to determine the legality of their detention has authoritatively been found to be a principle of customary international law.

Customary international law is formed when states act in a certain manner with the expectation that they have a legal obligation to do so. Once the state practice and *opinio juris* necessary to form customary international law have formed, a state's failure to fulfill an obligation so formed is a violation of international law.

A valuable reflection of both state practice and *opinio juris* is the ratification of treaties containing the obligation alleged to be customary international law. Such ratifications indicate that the concerned states acknowledge a given rule as a legal obligation.

The right to access to a court is customary international law because the overwhelming majority of the international community has agreed to declarations or ratified treaties recognizing this right and numerous international tribunals have held this legal obligation to be part of customary international law. The United States has often been among those who have supported this right.

Foremost among the expressions of this right is the Universal Declaration of Human Rights, U.N.G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), that was adopted without a vote against it and which recognizes "the right to

an effective remedy by the competent national tribunals for acts violating the fundamental rights granted." Art. 8.

This right is also found in article XVIII of the American Declaration on the Rights and Duties of Man. The United States government has admitted that although "[t]his Article does not require the courts to reach a certain outcome with respect to the alleged denial of legal rights … Article XVIII is addressed to ensuring that there is a procedure available to ensure respect for legal rights." Representations of the United States government to the Inter-American Commission *restated in The Haitian Centre for Human Rights et al. v. United States*, Case 10.657, Report No. 51/96, Inter-Am.C.H.R., OAS. Doc. OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1996) at para. 110.

The right of access to a Court is also recognized in the other two instruments that make up the International Bill of Human Rights the International Covenant of Civil and Political Rights which has been ratified by 151 states, including the United States, and the International Covenant of Economic Social, and Cultural Rights that has been ratified by 148 states. In total, these two treaties have acquired 299 ratifications. Office of the United Nations High Commissioner for Human Rights, *Status of the Ratification of the Principle International Human Rights Treaties*, as of 2 November 2003 at p. 12.

Article 2, paragraph 3 of the ICCPR as indicated above in section A has been held to be violated when a defendant is prevented from accessing the courts to review his detention. *See Currie v. Jamaica* and *Luyeye v. Zaire*, *supra* 8.

Equally, article 2, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights, U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into*

force 3 January 1976 has been authoritatively interpreted by the Committee on Economic, Social and Cultural Rights to provide the right of access to a court. UN Committee on Economic, Social and Cultural Rights Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States parties obligations (Art. 2, para. 1 of the Covenant) (Fifth session, 1990) *reprinted in* United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 at 45 (1994) at para. 5.

The protection of these rights for foreign nationals is of particular pertinence. The American Law Institute acknowledged this stating that "[a] state's responsibility to individuals for foreign nationality under customary international law included the obligation to respect civil and political rights articulated in the principle international human rights instruments—the Universal Declaration and the International Covenant of Civil and Political Rights—as human rights generally…." American Law Institute, *Restatement (Third) of the Foreign Relations law of the United States* §711 (1987) at cmt. c., p. 186. Moreover, according to the American Law Institute, while "[c]ustomary law also holds a state responsible for a "consistent pattern of gross violations" of human rights of any persons subject to its jurisdiction" … "[a]s regards foreign nationals, however, a state is responsible even for a single violation of many of the civil and political rights proclaimed in the Universal Declaration." *Id.*

The right of access to a court is also found in article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* 26 June 1987 that is ratified by 133 states including the United States; article 6 of the

International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* 4 January 1969 that is ratified by 169 states including the United States; as well as article 7 of the African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, *entered into force* 21 October 1986 that is ratified by 53 states; article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, *entered into force* 3 September 1953 that is ratified by 44 states; and the American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* 18 July 1978 that is ratified by 25 states.

As indicated above in section A, both the Inter-American Commission and Court have also found the right to have access to a court to determine violations of international human rights law is binding on OAS member states whether or not they have ratified the American Convention on Human Rights. The Inter-American Commission has also found that this right was violated when individuals were held in Guantánamo Bay Naval Base in Cuba by American authorities and without access to the United States courts. *The Haitian Centre for Human Rights et al. v. United States*, Case 10.657, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1996) at para. 180.

The right of access to a court for the determination of allegation involving human rights has also been recognized in the constitutions and practices of numerous states.

Every one of forty-five the European states members of the Council of Europe guarantee both nationals and foreigners access to their courts when an individual claim his human rights have been violated by the respective government. When this guarantee is not met in practice the individual may have access to the European Court of

Human Rights. This Court has unambiguously held that every individual has an affirmative right of access to a court to protect his human rights. *Golder v. UK*, Eur.Ct.H.R., Ser. A, No. 18 (1975) at paras. 56-58.

Every one of the 54 constitutions in Africa guarantee the right of access to a court and in practice when this right has not been respected African states have been held to have violated international human rights law. When, for example, the government of Sudan failed to provide twenty-six defendants with access to an independent and impartial tribunal, the African Commission of Human and Peoples' Rights and the United States claimed that the government was in violation of its human rights obligations. This was not withstanding the fact that article 34 of the Sudanese Constitution provides for a right of access to a court of law and the fact that the government had brought the defendants before a military tribunals claming that they had committed serious acts of violence against the state. *Law Office of Ghazi Suleiman v. Sudan*, Comms. 222/98 and 229/99, *Decisions on Communications Brought Before the African Commission, Decisions adopted at the 33nd Ordinary Session held in Naimey, Niger* (May 2003) at p. 3 (the Commission also found the rights to fair trial to form obligations *erga omnes* on states).

The authoritative decisions of international human rights bodies, the multitude of treaties agreed to by states, including the United States, and the state practice reflected by the adoption and adherence to these treaties, combine to express an overwhelming *opinio juris* evidencing that the right of access to a court has become customary international law.

This right is violated when the United States courts refuse to take jurisdiction over claims by Petitioners that their human rights have been violated. In violating this

right, the United States puts itself among the states that least respect the international rule of law and its actions give rise to state responsibility.

II. THE UNITED STATES FAILURE TO RESPECT THIS DUTY PROVIDES OTHER STATES A JUSTIFICATION FOR ACTIONS AGAINST THE UNITED STATES

A state that is responsible for an internationally wrongful act is under an obligation to cease the act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition. Malcolm N. Shaw, *International Law* 714 (5th ed. 2003). *Also see, supra* at p. 5, article 30 of the ILC Articles.

Furthermore, in the *LaGrande Case*, the International Court of Justice held that a mere apology is an insufficient remedy and that an injured person must have access to a judicial remedy in which his or her basic human rights can be determined. *Germany v. United States*, I.C.J. Reports, No 104 (27 June 2001) at para. 125.

In addition, an internationally wrongful act by a state gives rise to a right of other states to take countermeasures. The International Court has accepted that countermeasures can justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and directed against that State." *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports* 7 (1997) at p. 55, para. 83.

Because of the fundamental nature of the right of access to a court, *see Golder*, *supra* at 14, para. 35 (recognizing that other due process rights are "of no value at all if there are no judicial proceedings"), it must be considered as an obligation *erga omnes*, thereby creating an interest in ensuring its respect for all states in the international community.

Should any state or international organization seek to take action against the United States because of its courts failure to exercise jurisdiction over the prisoners in Guantánamo Bay Naval Base the actions may be legally justified by the United States violation off the law. Such actions taken against the United States may indirectly threaten the security and well-being of the country, for example, if they include the failure off other states to cooperate with the United States on criminal matters.

Where, as in this case, the violation involves an obligation *erga omnes* the right to seek redress accrues to all the states of the international community. This intensifies the dangerous consequences that may follow from the United States' failure to respect international law.

Finally, violation of international law by the United States government plays into the hands of non-state actors seeking to justify their use of force against the United States. These actors an—and do—claim that because the United States government does not respect international law, neither will they.

CONCLUSION

For the abovestated reasons, the Court should find that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay Naval Base, Cuba when violations of these individuals' human rights are alleged.

Respectfully submitted,

JAMES R. KLIMASKI*
KLIMASKI & ASSOCIATES, P.C.
1400 K Street, N.W.
Washington, DC 20005
(202) 296-5600

CURTIS F.J. DOEBBLER
JOHN MITCHELL
CHRISTINE CHINKIN
JAMES GRAY

*Counsel of Record

13 January 2004

(17) (16)

Nos. 03-334; 03-343

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF DIEGO C. ASENCIO, A. PETER BURLEIGH, LINCOLN GORDON, ALLEN HOLMES, ROBERT V. KEELEY, L. BRUCE LAINGEN, ANTHONY LAKE, SAMUEL W. LEWIS, STEPHEN LOW, ROBERT A. MARTIN, ARTHUR MUDGE, DAVID NEWSOM, R. H. NOLTE, HERBERT S. OKUN, THOMAS R. PICKERING, ANTHONY QUAINTON, WILLIAM D. ROGERS, MONTEAGLE STEARNS, VIRON P. VAKY, RICHARD N. VIETS, ALEXANDER F. WATSON, WILLIAM WATTS, AND ROBERT J. WOZNIAK AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

WILLIAM M. HANNAY
Counsel of Record
KATHRYN D. ZALEWSKI
ARON L. BORNSTEIN
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5500

Counsel for Amici Curiae

185224

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF AMICI CURIAE[1]

Each of the *amici curiae* has been in the diplomatic service of the United States government, for the most part as a presidential appointee.

The names and diplomatic posts of the *amici curiae* are as follows:

Diego C. Asencio served as Ambassador to Colombia from 1977 to 1980, Assistant Secretary of State for Consular Affairs from 1980 to 1983, Ambassador to Brazil from 1983 to 1986, and Chairman of the Commission for the Study of International Migration and Cooperative Economic Development from 1987 to 1989.

A. Peter Burleigh served as Ambassador and Coordinator for Counter-Terrorism from 1991 to 1992, Ambassador to Sri Lanka and the Maldives from 1995 to 1997, and Ambassador and Deputy Permanent Representative to the United Nations from 1997 to 1999.

Lincoln Gordon served as Ambassador to Brazil from 1961 to 1966 and Assistant Secretary of State for Inter-American Affairs from 1966 to 1967.

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1. The parties in the petitions have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that the law firm of Arnold & Porter represents the twelve Kuwaiti detainees who are petitioners, but that firm is not counsel of record for any party in this proceeding. William D. Rogers, a retired partner of Arnold & Porter and one of the former United States diplomats on whose behalf this *amici* brief is filed, contributed to its drafting with the assistance of other Arnold & Porter attorneys. No person or entity other than the *amici curiae* or their counsel of record has made a monetary contribution to the preparation or submission of this brief.

Allen Holmes served as Ambassador to Portugal from 1982 to 1985, Assistant Secretary of State for Political-Military Affairs from 1985 to 1989, and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict from 1993 to 1999.

Robert V. Keeley served as Ambassador to Mauritius from 1976 to 1978, Deputy Assistant Secretary of State for African Affairs from 1978 to 1980, Ambassador to Zimbabwe 1980 to 1984, and Ambassador to Greece from 1985 to 1989.

L. Bruce Laingen served as Ambassador to Malta from 1977 to 1979 and Charges D'Affaires in Tehran from 1979 to 1981.

Anthony Lake is a Professor at Georgetown University's School of Foreign Service, and served as Assistant to the President for National Security Affairs from 1993 to 1997.

Samuel W. Lewis served as Assistant Secretary of State for International Organization Affairs from 1975 to 1977, Ambassador to Israel from 1977 to 1985, and Director of the State Department Policy Planning Staff from 1993 to 1994.

Stephen Low served as a senior member of the National Security Council Staff from 1974 to 1976, Ambassador to Zambia from 1976 to 1979, Ambassador to Nigeria from 1979 to 1981, and Director of the Foreign Service Institute from 1982 to 1987.

Robert A. Martin served as a Foreign Service Officer from 1961 to 1994.

Arthur Mudge served as USAID Assistant General Counsel from 1967 to 1969, USAID Mission Director in Guyana from 1974 to 1976, USAID Mission Director in Nicaragua from 1976 to 1978, and USAID Mission Director in Sudan from 1980 to 1983.

David Newsom served as Ambassador to Libya from 1965 to 1969, Ambassador to Indonesia from 1973 to 1977, Ambassador to the Philippines from 1977 to 1978, and Undersecretary for Political Affairs from 1978 to 1981.

R.H. Nolte served as Ambassador to Egypt in 1967.

Herbert S. Okun served as Ambassador to the German Democratic Republic from 1980 to 1983, Ambassador and Deputy Permanent Representative to the United Nations from 1985 to 1989, and United States Member of the Group of International Advisors to the International Commission of the Red Cross from 1996 to 2000.

Thomas R. Pickering served as Ambassador to Jordan from 1974 to 1978, Assistant Secretary of State for Oceans, Environment and Science from 1978 to 1981, Ambassador to Nigeria from 1981 to 1983, Ambassador to El Salvador from 1983 to 1985, Ambassador to Israel from 1985 to 1988, Ambassador and Representative to the United Nations from 1989 to 1992, Ambassador to India from 1992 to 1993, Ambassador to the Russian Federation from 1993 to 1996, and Under Secretary of State for Political Affairs from 1997 to 2001. He currently serves as Senior Vice President of International Affairs at the Boeing Company.

Anthony Quainton served as Ambassador to Central African Republic from 1976 to 1978, Ambassador to

Nicaragua from 1982 to 1984, Ambassador to Kuwait from 1984 to 1987, and Ambassador to Peru from 1989 to 1992.

William D. Rogers served as Assistant Secretary of State for Inter-American Affairs, U.S. Coordinator, Alliance for Progress, from 1974 to 1976, and Under Secretary of State for Economic Affairs from 1976 to 1977.

Monteagle Stearns served as Ambassador to Ivory Coast from 1976 to 1979, Vice President of the National Defense University from 1979 to 1981, and Ambassador to Greece from 1981 to 1985.

Viron P. Vaky served as Ambassador to Costa Rica from 1972 to 1974, Ambassador to Colombia from 1974 to 1976, Ambassador to Venezuela from 1976 to 1978, and Assistant Secretary of State for Inter-American Affairs from 1978 to 1980.

Richard N. Viets served as Ambassador to Jordan from 1981 to 1984.

Alexander F. Watson served as Ambassador to Peru from 1986 to 1989, Ambassador and Deputy Permanent Representative to the United Nations from 1989 to 1993, and Assistant Secretary of State for Western Hemisphere Affairs from 1993 to 1996.

William Watts served as a Foreign Service Officer from 1956 to 1965 and Staff Secretary and Senior Staff Member of the National Security Council in the White House from 1969 to 1970.

Robert J. Wozniak served as Counselor for Public Affairs at the U.S. embassies in Greece and Morocco and at the U.S. mission to NATO headquarters in Brussels, and as Public Affairs Officer at the U.S. embassies in Cyprus and Syria from 1970 to 1992.

Each is persuaded, as will appear below, that these cases present issues of profound importance to the future role and influence of the United States in the world. Accordingly, a*mici curiae* submit this brief in support of the petitioners, Shafiq Rasul, *et al.* and Fawzi Khalid Abdullah Fahad Al Odah, *et al.*

SUMMARY OF ARGUMENT

The courts below denied review of the Executive Branch's incarceration of the petitioners, effectively holding that if it does so on foreign soil its action is beyond judicial review.

The rulings have not gone unnoticed abroad. Governments and international organizations have criticized them. Other nations have seen a license to incarcerate their own citizens and others with impunity.

This undermines what has long been one of our proudest diplomatic advantages – the nation's Constitutional guaranty, enforced by an independent judiciary, against arbitrary government.

ARGUMENT

We, the *amici curiae* lending our names in support of this brief, have all been in the diplomatic service of the United States. Some have been ambassadors or foreign service officers, others have had appointments at senior levels in the Department of State or in the other agencies of the United States Government dealing with "that vast external realm." All are retired from public service.

It is not our purpose to add to what the parties will offer on the merits. We hope rather to enlarge on their presentation by setting before the Court our collective professional experience as to the significance for American diplomacy and international relations of the holdings of the court below.

We understand that the D.C. Circuit Court of Appeals held that the detention by the Executive Branch of the Government of the United States of twelve Kuwaiti nationals, two British nationals, and two Australian nationals is beyond review by the Judicial Branch of that same Government. This Court agreed to review whether U.S. courts have jurisdiction to "consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." Under the D.C. Circuit's reading of *Johnson v. Eisentrager*,[2] the resolution of this issue turned on its determination of the technical legal status of the Guantanamo Bay enclave.

But critical to the holding in *Johnson* was the fact that the prisoners actually had been tried and that they were

2. 339 U.S. 763, 785-88 (1950).

challenging not the utter lack of process but rather the authority of the military tribunal that tried them. Here, there have been no trials and no independent judicial process of any kind. There is reason to fear that the international community, like at least one United States court, will understand the Executive Branch to be saying that it might imprison these detainees "as it will, when it pleases, without any compliance with any rule of law of any kind . . . and without acknowledging any judicial forum in which its actions may be challenged."[3] Because the prisoners in *Johnson* had been afforded a modicum of due process, the Court in *Johnson* had no occasion to contemplate, and cannot be read as addressing, a position so grave, startling and extreme as that presented by the Executive here. It is the impact of such an assertion on our nation's diplomacy, its relations with other countries, and its image in the world that invoke our concern.

These sixteen Guantanamo prisoners undeniably are imprisoned by authority of the United States. They have not been charged with a criminal offense. They have no counsel. Their detention for all that is known is indefinite. They are kept in small cells. Their every activity is controlled by officers of the Executive Branch. They may, for all that appears, be held in Guantanamo forever, with no tribunal, military or civilian, having found that they committed a crime. Nor, for so long as the lower court's determination stands, can a court inquire into their custody. That these sixteen have been deprived of their liberty is beyond debate.

This is, from our foreign policy experience, a case of vast public import. Indeed, it has already become notorious

3. *Gherebi v. Bush*, No. 03-55785, 2003 WL 22971053, at *14 (9th Cir., Dec. 18, 2003).

abroad. The world has taken due note of the fact that the United States has incarcerated these petitioners in Guantanamo and that there has been no effort to charge, try or judge them under law. This has generated international concern. The Inter-American Commission on Human Rights has undertaken precautionary measures.[4] The UN High Commissioner for Human Rights has spoken out.[5] The International Committee of the Red Cross has gone on record.[6] The British Court of Appeal in the *Abbasi* case has expressed its displeasure.[7] The Human Rights Chamber of

4. Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), Inter-Am. C.H.R. (March 12, 2002) *reprinted in* 41 I.L.M. 532 (2002) (requesting that prisoners be granted hearings on their status before a "competent tribunal").

5. Press Release, Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba, (Jan. 16, 2002), *available at* www.unhchr.ch under "news room, statements/messages" (last visited Sept. 30, 2003) (recalling that legal status of detainees, if disputed, must be determined by a "competent tribunal"); *see also* Press Release, U.S. Court Decision on Guantanamo Detainees Has Serious Implications for Rule of Law, says UN Rights Expert, (March 12, 2003), *available at* www.unhchr.ch under "news room, press releases" (last visited Sept. 30, 2003) (ruling below "offends the first principle of the rule of law" and "can set a dangerous precedent").

6. Operational Update, *Guantanamo Bay: Overview of the ICRC's work for detainees*, Int'l Comm. of the Red Cross (Aug. 25, 2003), *available at* www.icrc.org (last visited Sept. 30, 2003) ("The ICRC's main concern today is that the US authorities have placed the internees in Guantanamo beyond the law . . . .").

7. *Abbasi v. Secretary of State*, 2002 EWCA Civ 1598, 2002 All ER (D) (Nov) (U.K. Ct. App. 2002), par. 107 ("We have made

(Cont'd)

Bosnia-Herzegovina, a court that the United States helped create, has issued its own protest.[8] And Shirin Ebadi, the recipient of the most recent Nobel Peace Prize, referred specifically to Guantanamo in her acceptance remarks as an affront to universal human rights.[9]

The world understands that this country must address how our criminal justice system is to be altered to take account of the contemporary realities of terrorism. That is a domestic matter. The Guantanamo prisoners case has become

(Cont'd)
clear our deep concern that, in apparent contravention of fundamental principles of law, Mr. Abbasi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.").

8. *Boudellaa et al. v. Bosnia and Herzegovina et al.*, Decision on Admissibility and Merits, Cases nos. CH/02/8679 *et seq.*, Human Rights Chamber for Bosnia and Herzegovina (Oct. 11, 2002), *available at* www.hrc.ba (visited Sept. 30, 2003), pars. 233 (hand-over of prisoners to U.S., before their transfer to Guantanamo, violated "obligations to protect the applicants against arbitrary detention by foreign forces") & 333 (Bosnia and Herzegovina must retain lawyers "to take all necessary action in order to protect the applicants' rights while in US custody . . . .").

9. Shirin Ebadi, Nobel Peace Prize Address before the Norwegian Nobel Committee (Dec. 10, 2003), *available at* http://www.iranmania.com/News/ArticleView/Default.asp?NewsCode=20500&NewsKin ("The concerns of human rights' advocates increase when they observe that international human rights laws are breached not only by their recognized opponents[,] . . . but . . . also violated in Western democracies, . . . countries which were themselves among the initial codifiers of the United Nations Charter and the Universal Declaration of Human Rights.").

an issue of unusual concern abroad because it is a vivid reminder how America's undoubted military power may be applied elsewhere. Citizens of foreign countries cannot assume that what happened to the Guantanamo prisoners cannot happen to them. It will not be evident why, if the Executive Branch can detain prisoners in Guantanamo free of judicial inquiry, it cannot expand the practice to establish a global criminal justice system with other prison camps like Guantanamo, similarly subject to no legal oversight and in which any foreigner deemed a danger by some official might be detained indefinitely. Nor will it be evident why such a practice could not reach out to persons within the United States or even to American citizens.

This is because the lower court's decision turned on the fact that the prisoners are in Guantanamo Bay, Cuba. The nice distinction in the Court of Appeals' opinion – that the executive branch of the United States government can act as it will in Cuba, but the hand of the judiciary cannot reach that conduct – is lost on others.

This use by the American military of its base in Cuba has a particular resonance abroad. As this Court well knows, Guantanamo is an artifact of America's imperial age in this Hemisphere. There is, in the view of others, a heavy irony that these prisoners should be claimed to be beyond the reach of the law simply because they are being held in an enclave in Cuba – a nation whose authoritarian pretensions this country has opposed for forty years.

It has been the experience of each of us that our most important diplomatic asset has been this nation's values. Power counts. But this nation's respect for the rule of law – and in particular our reverence for the fundamental

constitutional guarantee of individual freedom from arbitrary government authority – have gone far to earn us the respect and trust which lie at the heart of all cordial relations between nations. Thus the perception of this case abroad – that the power of the United States can be exercised outside the law and even, it is presumed, in conflict with the law – will diminish our stature and repute in the wider world.

We have come to believe, in our representation of this country to other nations, that those nations are more willing to accept American leadership and counsel to the extent that they see us as true to the principle of freedom under the law. Indeed, the matter has rarely been better put than by President Bush in signing the Torture Victims Protection Act on March 12, 1992:

> In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that they are respected everywhere.[10]

The teaching of the courts below, however, is that those "democratic institutions and the rule of law," as far as the Judicial Branch is concerned, need not be respected in Guantanamo or indeed anywhere other than in the United States. This puts United States citizens abroad – as well as those of other nations – at risk because it can be invoked in support of other countries' practices of arbitrary detention. When the second Gulf War began, many predicted that Guantanamo Bay signaled a "double standard" that Iraq and others would use to justify mistreatment of American and

10. Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 465 (March 12, 1992).

coalition POWs.[11] Unfortunately, that message appears to have been received. Other states have already used the United States' example to justify their own abuses. For example, explaining the detention of militants without trial, Malaysia's law minister said that the practice was "just like the process in Guantanamo Bay." He emphasized that he "put the equation with Guantanamo just to make it graphic to you that this is not simply a Malaysian style of doing things."[12]

11. *See, e.g.*, Jamie Fellner, *Prisoners of War in Iraq and at Guantanamo; Double Standards*, INT'L HERALD TRIB., March 31, 2003 ("At risk are not only the rights of the individuals who are detained today: by ignoring the clear mandates of international law, the United States invites every other country, including Iraq, to do the same."); Ivan Roman, *Critics: Guantanamo Example May Hurt POWs*, ORLANDO SENTINEL, March 30, 2003 ("Months before the first bomb was dropped on Baghdad on March 19, concerns arose about the Pentagon's position regarding the Guantanamo detainees and the implications it could have on its own troops heading to the Middle East."); Praful Bidwai, *Iraq: Doubts Grow on Quick Coalition Victory*, INT'L PRESS SERV., March 24, 2003 (noting that U.S. "double standards" on POWs are "starkly revealed" by detention of suspects in Guantanamo Bay, "often in chains and inside cages. . . . Equally deplorable is the U.S. threat to treat Iraq's army officers as 'war criminals' merely because they are defending their country, while insisting that the U.S. prisoner-invaders be treated as POWs.").

12. Sean Yoong, *Malaysia slams criticism of security law allowing detention without trial*, Assoc. Press, Sept. 17, 2003. Egypt has also moved to detain human rights campaigners as threats to national security, as have Ivory Coast, Cameroon, and Burkina Faso. "The insistence by the Bush administration on keeping Taliban and Al Qaeda captives in indefinite detention in Guantanamo Bay, Cuba, instead of jails in the United States – and the White House's preference for military tribunals over regular courts – helps create a free license for tyranny in Africa." Shehu Sani, *U.S. actions send a bad signal to Africa: Inspiring intolerance*, INT'L HERALD TRIB., Sept. 15, 2003.

The present Administration summed up two centuries of foreign policy in the *National Security Strategy of the United States of America*, issued in September 2002. That document said that the essence of American foreign policy was a "distinctly American internationalism that reflects the union of our values and our national interests." It added that "[i]n pursuit of our goals, our first imperative is to clarify what we stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere." It promised: "We will speak out honestly about violations of the nonnegotiable demands of human dignity." And it defined these "nonnegotiable demands of human dignity" as including "the rule of law," "equal justice," and "limits on the absolute power of the state."[13]

In our professional experience we have found these principles to be the strongest assets of American diplomacy. The admiration and respect for this nation abroad is a function of our own commitment to liberty under law. In this, we have led the world. The success of our interests in the wider arena turns importantly on the extent to which this nation is perceived as continuing to abide by these principles. Any hint that America is not all that it claims, or that it is prepared to ignore a "nonnegotiable demand of human dignity," that it can accept that the Executive Branch may imprison whom it will and do so beyond the reach of the due process of law, demeans and weakens this nation's voice abroad.

We have taken it as our duty to so state to this Court. Power counts, and there is no doubting America's power at

13. National Security Strategy of the United States of America (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nss.html.

this juncture. But values count too. And, for this nation, there is no benefit in the exercise of our undoubted power unless it is deployed in the service of fundamental values: democracy, the rule of law, human rights, and due process. To the extent that we are perceived as compromising those values, to that extent will our efforts to promote our interests in the wider world be prejudiced. Such at least is our collective experience.

George Kennan's Long Telegram from the American Embassy in Moscow to the State Department in 1946 defined the authoritarian bestiality of the Soviet system and its aim to break "the international authority of our state."[14] It was perhaps the most important American diplomatic communication of the last Century. In closing, Kennan spoke for us all and for all time:

> [T]he greatest danger that can befall us in coping with this problem of Soviet communism, is that we shall allow ourselves to become like those with whom we are coping.[15]

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14. George Kennan, *"The Long Telegram" from Moscow, Feb. 22, 1946, in* FOREIGN RELATIONS OF THE UNITED STATES 706 VOL. VI (Government Printing Office, 1969).

15. *Id.* at 709.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted,

WILLIAM M. HANNAY
Counsel of Record
KATHRYN D. ZALEWSKI
ARON L. BORNSTEIN
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5500
Counsel for Amici Curiae

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

(18) (17)

Nos. 03-334 and 03-343

In the Supreme Court of the United States

SHAFIQ RASUL, ET AL., *Petitioners*
v.
GEORGE W. BUSH, ET AL., *Respondents*

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., *Petitioners*
v.
UNITED STATES OF AMERICA, ET AL., *Respondents*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

RONALD W. MEISTER
Counsel of Record
JASON D. SANDERS
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, NY 10036
(212) 790-9200

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INTEREST OF THE AMICUS CURIAE[1]

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and to foster improved public understanding of the military justice system. NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces, and appeared in this Court as an *amicus* in support of the Government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999). NIMJ is actively involved in public education through its website, <www.nimj.org>, and through publications including the *Annotated Guide to Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* (2002) and the *Military Commission Instructions Sourcebook* (2003). NIMJ sponsored the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice, chaired by Hon. Walter T. Cox III, former Chief Judge of the United States Court of Appeals for the Armed Forces. NIMJ's advisory board includes law professors, private practitioners and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers. NIMJ is entirely independent of the Government, and relies exclusively on voluntary contributions for its programs.

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[1] Counsel for all parties have consented to the filing of this brief. Copies of their letters have been filed with the Clerk. Counsel for NIMJ have authored this brief in whole, and no person or entity other than the amicus, its members or its counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Government relies on *Johnson v. Eisentrager* for the proposition that upholding jurisdiction over prisoners held by the United States military at Guantanamo Bay will interfere with the exercise of the executive's power by "fettering...field commander[s]." (Brief for the Respondents in Opposition to the petitions for certiorari ("Opp.") at 11) The National Institute of Military Justice submits this brief to emphasize that, in the half-century since *Eisentrager*, both domestic military law and the international law of war have advanced, increasing the role of the judiciary in respect of military matters, in war as well as in peace. A well-developed body of law regarding individuals seized during hostilities has been enforced regularly by impartial tribunals in past conflicts, and is being applied today by United States armed forces in combat. The application of the rule of law to individuals seized during hostilities is not inconsistent with the Executive Branch's exercise of its war powers, either in theory or in the practice of the United States over the past fifty years. Nor is there anything novel about issuing a writ of habeas corpus on the application of an individual confined by the military at Guantanamo Bay, something the highest court of the military did in *Burtt v. Schick*, 23 M.J. 140 (1986).

ARGUMENT

I. The History Of Domestic And International Military Law Since *Eisentrager* Has Been One Of Steady Progress In The Rule Of Law During Hostilities As Well As In Peacetime

A. Domestic Law

On May 5, 1950, one month before this Court decided *Johnson v. Eisentrager*, 339 U.S. 763 (1950), President Truman signed into law the Uniform Code of Military Justice ("UCMJ"), Pub. L. No. 81-506, 64 Stat. 107, 149 (1950). When it became effective on May 31, 1951, the UCMJ for the first time established a single statutory basis for the administration of justice in all of the United States armed forces. Congress provided that the UCMJ applies equally in peace and war, worldwide, UCMJ art. 5, 10 U.S.C. § 805, and to American service members and prisoners of war in custody of the armed forces, UCMJ art. 2(a)(1), (9), 10 U.S.C. § 802(a)(1), (9).

The UCMJ reflects a Legislative Branch determination that rules of law can and do apply to prisoners of war and other persons located at, among other places, Guantanamo Bay. Under Article 2, entitled "Persons subject to this chapter," the UCMJ is specifically made applicable to "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States [with exceptions not applicable]." UCMJ art. 2(a)(12), 10 U.S.C. § 802 (a)(12). The United States base at Guantanamo Bay is one such area.

This congressionally-mandated system of military law is modern, comprehensive and of general application. Moreover, although the UCMJ delegates to the President the power to prescribe rules of procedure before courts-martial, military commissions, and other military tribunals, it circumscribes that power with the requirement that such procedures "not be contrary to or inconsistent with this chapter." UCMJ art. 36, 10 U.S.C. § 836. The Executive Branch, in prescribing rules for military commissions, may thus not impose procedural rules inconsistent with the UCMJ.

The UCMJ established not only a code of substantive and procedural law, but also a tiered system of judicial review, including intermediate appellate courts, UCMJ art. 66, 10 U.S.C. § 866, and extending up to the civilian United States Court of Appeals for the Armed Forces, formerly the United States Court of Military Appeals, UCMJ arts. 67, 141-45, 10 U.S.C. §§ 867, 941-45. The Military Justice Acts of 1968, Pub. L. No. 90-632, 82 Stat. 1335, and of 1983, Pub. L. No. 98-209, 310(a)(1), 97 Stat. 1405, further professionalized court-martial personnel, see UCMJ arts. 26, 66, 10 U.S.C. §§ 826, 866, and added certiorari jurisdiction in this Court, UCMJ art. 67a, 10 U.S.C. § 867a; 28 U.S.C. § 1259. Congress has forbidden military officers and other persons subject to the UCMJ to influence unlawfully the actions of courts-martial and other military tribunals, UCMJ art. 37, 10 U.S.C. § 837, and the military services have taken further steps to reduce command influence and insure the independence of the judiciary.

This Court, as well as courts throughout the military justice system, regularly re-affirm that military

personnel do not forfeit their rights to the protection of the law when they enter the military. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22 (1955); *United States v. Jacoby*, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960). Military personnel and prisoners of war in custody of the armed forces enjoy the following protections and guarantees, among others:

- Against self-incrimination, *compare* U.S. Const. amend. 5 *with* UCMJ art. 31, 10 U.S.C. § 831.

- Against double jeopardy, *compare* U.S. Const. amend. 5 *with* UCMJ art. 44, 10 U.S.C. § 844.

- Against cruel and unusual punishment, *compare* U.S. Const. amend. 8 *with* UCMJ art. 55, 10 U.S.C. § 855; see *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983).

- To a speedy trial, *compare* U.S. Const. amend. 6 *with* Rule for Courts-Martial 707.

- To a knowing, intelligent and voluntary waiver of trial rights before entering a guilty plea. *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1967).

Significantly, the rule of law in the military has also been enforced through the issuance of writs of habeas corpus by civilian courts. *E.g.*, *Reid v. Covert*, 354 U.S. 1 (1957); *Toth, supra*.

Over a half century of experience with the UCMJ has justified the Legislative determination that the rule of law can be applied in peace and war without modification and without concern that doing so will interfere with Executive Branch power.

B. International Law

The international law governing captured combatants has also developed since the tribunal that adjudicated the guilt and innocence of the various defendants in *Eisentrager* was held. In 1955, the United States ratified the Third and Fourth Geneva Conventions, relating to the treatment of prisoners of war, 6 U.S.T. 3316, T.I.A.S. 3364, and the protection of civilians in time of war, 6 U.S.T. 3516, T.I.A.S. 3365. These conventions have now been ratified by 191 nations, and form the cornerstone of international law regarding the treatment of belligerents. They provide as a bedrock principle that "every person in enemy hands must have some status under international law....There is no intermediate status; nobody in enemy hands can be outside the law." International Committee of the Red Cross, *Commentary on the Fourth Geneva Convention* 51 (Jean S. Pictet ed. 1952). Central to these conventions is the principle that, "having committed a belligerent act and having fallen into the hands of the enemy...such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("GPW"); see Evan J. Wallach, *Afghanistan,* Quirin *and* Uchiyama*: Does the Sauce Suit the Gander?* Army Law., Nov. 2003, at 18.

These developments in international law are designed to safeguard basic rights of captured personnel and avoid abuses that occurred in past conflicts. They are consistent with the increased emphasis on the rule of law as applied to this country's own military personnel. The United States has

committed itself to abide by these rules, prides itself on its compliance with them, insists on compliance by other countries, and condemns foreign governments that depart from their provisions.

II. The Treatment Of Individuals Seized During Hostilities Is Governed By Long-Standing Law And Practice In The United States Military

A. Applicable Law Provides For The Determination Of Status By Impartial Tribunals

The military forces of the United States have implemented the international law that was enacted in the GPW, and was ratified long ago by the United States, by adopting as their own rules and practice the Convention's requirement that individuals seized in combat be afforded the protection of competent tribunals to determine their status in doubtful cases. Army Regulation 190-8, entitled Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6 (1997), provides:

> (a) In accordance with Article 5 [GPW], if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the U.S. Armed Forces, belongs to any of the categories enumerated under Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

> (b) A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

This identical regulation has been adopted in all branches of the United States armed forces. OPNAVINST 3461.6 (Navy), AF JI 31-304 (Air Force), MCO 3461.1 (Marine Corps). It reflects the consistent practice, at least since *Eisentrager*, of determining belligerent status through the use of impartial tribunals. See *Dep't of the Army, Field Manual on the Law of Land Warfare*, FM 27-10 § 71(a) (1956) (providing for a "competent tribunal" to determine the status of belligerents); MACV Directive No. 20-5 § 5(e) (Sept. 21, 1966, as amended Dec. 16, 1966) (stating that, in doubtful cases, "the necessity for a determination of status by a tribunal may arise"); Army Judge Advocate General's School, *Operational Law Handbook* 22 (O'Brien ed. 2003) (directing judge advocates to "advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status may be determined.")

In the United States military's Area of Operations ("AOR") that includes Afghanistan and Iraq, these provisions are further implemented by United States Central Command [CENTCOM] Regulation Number 27-13 (1995), which provides:

> All US military and civilian personnel of the Department of Defense (DOD) who take or have custody of a detainee will:....(2) Apply the protections of the GPW [Geneva Convention, Relative to the Treatment of Prisoners of War] to each EPW [Enemy Prisoner of War] and to each detainee whose status has not yet been determined by a Tribunal covered under this regulation.

This regulation applies to "all members of the United States Forces deployed to or operating in support of operations in the US CENTCOM AOR." Reg. 27-13 ¶ 2. Personnel who fail to treat any detainee in accordance with the GPW "may be subject to punishment under the UCMJ or as otherwise directed by competent authority." Reg. 27-13 ¶ 7(b).

There is simply no provision in any law, domestic or international, that permits a country's commander in chief, or its chief executive, to issue a blanket pronouncement that all personnel falling into the power of the United States in a particular theater of war are excluded from the protection of the GPW. The protections afforded by impartial tribunals are not voluntary or idiosyncratic efforts of field commanders, or applicable only to some detainees, but are the product of standing United States government regulations and orders that implement laws protecting all classes of detainees. These protections may not be circumvented by a claim that detained personnel are not entitled to status as enemy prisoners of war. By the explicit terms of the GPW, *every* detainee whose status has not been determined by an impartial tribunal is entitled to its protection.

Having undertaken to adhere to treaty obligations, our military services and Commander in Chief are not free to disregard them. *Service v. Dulles*, 354 U.S. 363 (1957). Petitioners here are asking for no more than the enforcement of protections provided by this Government's own procedures.

The Executive Branch has emphatically demanded – and rightly so, as required by international law – that these protections be accorded to Americans captured or detained in armed conflict, and has joined in condemnations of behavior that violates the Geneva Conventions. U.N.S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N.Doc. S/RES/674 (1990). The Defense Department recently "remind[ed] the Iraqis… [t]hat there are very clear obligations under the Geneva Convention to treat prisoners humanely." Statement of Deputy Secretary of Defense Wolfowitz, Mar. 23, 2003, Dep't of Defense News Transcript, <www.defenselink.mil/transcripts/2003/t03242003_t0323nec.html>. In objecting to the televised display of captured American soldiers, President Bush stated his insistence that prisoners be afforded the protections of international law. White House Press Release, March 23, 2003, <www.whitehouse.gov/news/releases/2003/03/20030323–1.html>.

In addition to these Executive Branch regulations and actions, Congress has specifically provided for court-martial jurisdiction over persons entitled to prisoner of war status at Guantanamo Bay. Such persons are explicitly within the jurisdiction of courts-martial pursuant to Article 2(a)(9) and (12) of the UCMJ, 10 U.S.C. § 802(a)(9), (12). Their presence in Guantanamo Bay is no obstacle to jurisdiction, because the UCMJ applies "in all places," UCMJ art. 5,

10 U.S.C. § 805. See Robinson O. Everett [Senior Judge, United States Court of Appeals for the Armed Forces], *The Law of War: Military Tribunals and the War on Terror*, Fed. Law. 20 (Nov./Dec. 2001).

Domestic law and practice thus make it clear that Guantanamo Bay has never been regarded by the United States as a "law-free" zone. United States courts exercise criminal jurisdiction over both citizens and aliens at Guantanamo Bay. 18 U.S.C. § 7(3); see *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975). In connection with the detainees currently interned at Guantanamo Bay, the United States has already asserted jurisdiction over an Army chaplain, two translators, and an intelligence officer. Judicial resolution of charges against those individuals has not troubled the Government, which is according rights to everyone except the detainees themselves.

While the Government devotes much attention to the supposed unavailability of habeas corpus in Guantanamo Bay, no such jurisdictional difficulty was found by the court with responsibility for the military justice system. In *Burtt v. Schick*, 23 M.J. 140 (1986), a Navy enlisted man confined at Guantanamo Bay sought a writ of habeas corpus after the prosecution had obtained a mistrial over his objection. Holding that the mistrial had been obtained without either "manifest necessity," *Arizona v. Washington*, 434 U.S. 497, 505 (1978), or the consent of the accused, the Court of Military Appeals unanimously granted the writ against the officer-in-charge of the Guantanamo Bay brig. In doing so, it found no obstacle to asserting habeas corpus jurisdiction over individuals at Guantanamo Bay.

B. Enforcement Of These Rules Does Not Interfere With Military Necessity

The experience of United States armed forces in combat belies the Government's expressed concern that judicial review of the claims of combatants "would interfere with the President's authority as Commander in Chief." (Opp. at 11) Courts-martial, prisoner status determinations, and other legal processes have been a regular adjunct of American wartime operations throughout the period since *Eisentrager*.

- During the Vietnam era, the United States Army held approximately 25,000 courts-martial in the war theater. In 1969 alone, 7691 of these were special and general courts-martial, which are trials presided over by a military judge in which the defendant is entitled to a panel equivalent to a jury as provided in the UCMJ. Frederic L. Borch, *Judge Advocates In Combat: Army Lawyers in Military Operations from Vietnam to Haiti* 29 (2001). Another 1146 special and general courts-martial were held in Vietnam by the Marine Corps in 1969. In addition, still only in 1969, the Army held 66,702 less formal disciplinary proceedings under Article 15 of the UCMJ, 10 U.S.C. § 815. *Id.*

- The United States Military Assistance Command in Vietnam enforced strict requirements for the classification of captured personnel, including providing impartial tribunals to determine eligibility for prisoner of war status. Military Assistance Command Vietnam, *Directive No. 381-46, Annex A* (Dec. 27, 1967) and *Directive No. 20-5* (Sept. 21, 1966 as amended Mar. 15, 1968.)

- During the 1991 Persian Gulf War, the status of approximately 1200 detainees was determined by "competent tribunals" established for that purpose. Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* 578 (1992); Army Judge Advocate General's School, *Operational Law Handbook 22* (O'Brien ed. 2003).

- At this very time, United States forces in Iraq, a theater of actual combat, are providing impartial tribunals compliant with Article 5 of the GPW to adjudicate the status of captured belligerents. Although details are difficult to come by, American commanders of forces in Iraq acknowledge that as many as 100 prisoners there have had their status adjudicated by impartial tribunals under Article 5 of the GPW. Dep't of Defense, *Briefing on Enemy Prisoner of War Status Categories, Releases and Paroles* (May 9, 2003).

If the United States is, at this very moment, providing Article 5 tribunals in a war theater, it is difficult to credit the argument that such tribunals in Guantanamo Bay would interfere with field commanders. Unlike the tribunals that operated in Vietnam, Iraq and elsewhere, tribunals in Guantanamo Bay, or courts in the continental United States with jurisdiction over the custodians of Guantanamo Bay detainees, would not be operating in war zones. The Government offers no credible argument that tribunals contemplated by Army regulations and required by the 191 nations subscribing to the Geneva Conventions would, in its words, "interfere with core war powers." Opp. at 19. Even less credible is the claim that providing prisoners who have been detained virtually incommunicado for almost two years without any

adjudication of status would constitute "use of litigation [as a] weapon" in ongoing hostilities as described in *Eisentrager*, 339 U.S. at 777-79. The rules, policy and practice of United States military forces show that the involvement of competent tribunals in determining the status and rights of detained combatants is a regular and necessary adjunct of military operations.

III. The Executive Branch Is Not Complying With These Rules, And Is Failing To Provide The Benefit Of The Process That Is In Place For Individuals Seized During Hostilities

At its heart, the position of the Executive Branch is that, because it has unilaterally declared these individuals to be outside the law, none of the existing rules governing the treatment of individuals detained in combat apply. Nor, it says, may any court or tribunal exercise the traditional power of ensuring that the Executive Branch obey the law, because, as Commander in Chief, the President has the final say on his own powers.

The Government's position is inconsistent with its own law and regulations, and with its actions in this and past conflicts. On the one hand, it argues that the domestic law enacted by Congress to provide for court-martial jurisdiction over individuals at Guantanamo Bay, the international law it has ratified to provide for impartial tribunals, and the military regulations it has adopted to apply and enforce those rules, are all inapplicable to these detainees because the Executive Branch says they interfere with the President's authority to make war. On the other hand, the Executive Branch by its actions insists on compliance

with these standards by other nations, and even accords statutory protections to its own personnel at Guantanamo Bay, the very site where it argues that judicial involvement will "fetter field commanders." So long as the United States applies this double standard, it unavoidably increases the jeopardy of United States personnel captured abroad, in this and future conflicts. If this country is to have credibility in seeking to apply standards of humane conduct in international conflict; if it is to maintain a position of moral leadership; and, not least, if it is to protect its own fighting forces, it should abide by the standards it has enacted, ratified and adopted.

The Solicitor General's authorities in support of a claimed unlimited and unreviewable right to "capture and detain," Opp. at 3, are particularly ill-chosen. In *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946), this Court granted a writ of habeas corpus holding that a Navy employee tried by a military tribunal in 1944 was "entitled to be released" because he was protected by the Constitution as interpreted under the Hawaiian Organic Act. In *Ex parte Quirin*, 317 U.S. 1 (1942), this Court adjudicated whether the petitioners were held in lawful custody and whether the tribunal trying them was lawfully constituted, convening in special session in defiance of a presidential order declaring that the federal courts were closed to these defendants. *Proclamation 2561, Denying Certain Enemies Access to the Courts of the United States*, 7 Fed. Reg. 5101 (Jul. 3, 1942).

While the Executive Branch concedes the possibility that these detainees may have rights, it maintains that it alone has authority to determine what those rights are. It has already determined that the

detainees are not entitled to know the charges against them, are subject to indefinite confinement whether or not charged and even if acquitted, can have no access to counsel, and are entitled to no judicial review of their status or the conditions of their confinement. Those basic protections being denied, it is difficult to enumerate what rights known to an American system of law the Executive Branch proposes to implement.

* * *

Military legal process can and does function without impairing the Executive's war powers. The United States has fought enemies the world over while recognizing and respecting the rights that it seeks to deny here. America's integrity, and the protection of this country's own fighting forces, demand that it continue to recognize those rights today. To ask that the Executive Branch comply with its own regulations, which in turn apply consistent domestic and international law, is not to seek any restraint on the executive function. To ask that the Judicial Branch exercise its traditional responsibility of applying the law, is not to seek any extension of the judicial function.

In the absence of law; in the absence of checks and balances; and in the absence of "the alembic of public scrutiny," *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (L. Hand, J.), the Executive Branch claims the right to operate an unprecedented secret American prison system free of any restraint or review. Affirming the decision below will leave the Executive Branch with unlimited and unreviewable discretion that fifty years of domestic and international legal developments have tried to contain.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

RONALD W. MEISTER
Counsel of Record
JASON D. SANDERS
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, NY 10036
(212) 790-9200
Counsel for Amicus Curiae
National Institute
of Military Justice

January 2004

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

No. 03-343

IN THE

Supreme Court of the United States

FAWZI AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE MILITARY ATTORNEYS ASSIGNED TO THE DEFENSE IN THE OFFICE OF MILITARY COMMISSIONS AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

Lieutenant Colonel
Sharon A. Shaffer
Lieutenant Commander
Charles Swift
Lieutenant Commander
Philip Sundel
Major Mark A. Bridges
Major Michael D. Mori
Office of Military
Commissions
1931 Jefferson Davis Hwy.
Suite 103
Arlington, VA 22202
(703) 607-1521

Neal Katyal
Counsel of Record
600 New Jersey Ave.,
Northwest
Washington, DC 20001
(202) 662-9000

January 14, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether United States courts lack jurisdication to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba?

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INTEREST OF AMICUS[1]

The military attorneys assigned to the defense in the Office of Military Commissions ("OMC") in the Office of the General Counsel of the United States Dep't of Defense, are under orders to defend named or yet-to-be-named individuals who are targets of investigations by military commissions that are to take place at Guantanamo Bay, Cuba.

Amicus submits this brief to explain why the Court should not reach an issue beyond the question presented, namely, whether the writ of habeas corpus ("habeas") is available to those who face military trials.

Each OMC lawyer assigned to the defense has a wealth of experience. Most have served as prosecutors as well as defense counsel. The listed co-counsel comprise every attorney assigned to defend individuals before commissions.[2]

Lieutenant Colonel Sharon A. Shaffer is the Deputy Chief Defense Counsel in OMC. She has tried over 200 cases in her fourteen years as a prosecutor and defense attorney. She most recently served as a Circuit Military Judge for three years and presided over 180 Courts-Martial.

Lieutenant Commander Charles Swift is military counsel for Salim Ahmed Hamdan. Mr. Hamdan, who is detained at Guantanamo, was designated by President Bush in July, 2003, as eligible for trial by commission. Before joining

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the *amicus* or its counsel made a monetary contribution to it. Filing and printing costs were paid by the National Security Fund at Georgetown University.

[2] The OMC Chief Defense Counsel himself does not enjoy attorney/client confidentiality and cannot function as a litigator or be involved in selecting defense strategies.

OMC, Lieutenant Commander Swift had nine years of litigation experience, six of them as a military defense attorney, and represented over 150 persons in Courts-Martial.

Lieutenant Commander Philip Sundel, before joining OMC, served as Deputy Director of the Navy-Marine Corps Appellate Government Division (where he supervised and argued over 300 appeals), as a Special Assistant U.S. Attorney, as an investigator/prosecutor with the International Criminal Tribunal for Rwanda, and as a defense counsel.

Major Mark A. Bridges, before joining OMC, had eleven years of military litigation experience. He has personally prosecuted or defended approximately 80 Courts-Martial, handled over 100 appeals, and supervised the prosecution and defense of hundreds of other Courts-Martial.

Major Michael D. Mori is military counsel for David Hicks, a petitioner in No. 03-334, *Rasul v. Bush*. President Bush designated Mr. Hicks eligible for military trial in July of 2003. Before joining OMC, Maj. Mori served as the chief prosecutor and Special Assistant U.S. Attorney for Marine Corps Base, Hawaii, and was responsible for the prosecution or defense of over 200 military criminal proceedings.

Amicus embraces the principles affirmed in *Reid v. Covert*, 354 U.S. 1, 39-40 (1957) (plurality op.) (citation omitted):

> Slight encroachments create new boundaries from which legions of power can seek new territory to capture. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure * * * *
>
> We should not break faith with this nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution. The country has remained true to that faith for almost one hundred seventy years. Perhaps no group in the Nation has been truer than military men themselves.

SUMMARY OF ARGUMENT

Amicus does not challenge or expect to challenge the power of the United States to wage war as its civilian and military leaders see fit. It does not challenge or expect to challenge the government's temporary detention of enemy combatants while military activities are underway abroad.

What *Amicus* does challenge is the attempt by the Executive to oust Article III courts of jurisdiction over the military prosecution of individuals whom the President deems "enemy combatants." Although military commissions will likely take place at Guantanamo, this sensitive jurisdictional issue is not within the question presented in this case, and the Court should not foreclose its consideration.

Johnson v. Eisentrager, 339 U.S. 763 (1950), supports civilian jurisdiction to examine aspects of the Guantanamo commissions. The Court's limitations on habeas corpus in that case were confined to Bill-of-Rights challenges brought by enemy aliens in a declared war (as per the 1798 Alien Enemy Act). And they were limited to a battlefield commander's legal proceedings (and not those orchestrated from the Pentagon over a several-year period). Moreover, unlike *Eisentrager*, where the petitioner was "at no relevant time and in no stage of his captivity" within the territorial jurisdiction of the United States' civilian courts, 339 U.S., at 768, some of those subject to military trial today may have been within the territorial jurisdiction, either because they were present in one of the 50 States or territories (including Guantanamo itself) or because they were transported, held, or interrogated on United States Government vessels.

In addition, several legal developments since *Eisentrager* confirm this Court's jurisdiction over such individuals, most particularly: (1) the adoption of the Uniform Code of Military Justice, which expressly confers jurisdiction over individuals in leased territories; (2) the worldwide ratification of the 1949 Geneva Conventions, and (3) several domestic extensions of criminal law and habeas law.

The Government's argument that today's struggle against terrorism is tantamount to World War II obscures several fact-specific inquiries for which case-by-case review is not only important, but is essential, *e.g.*, Is the defendant a citizen of an "enemy" nation? Was the defendant or the crime in U.S. territory? Is the defendant asserting a habeas right different from that asserted in *Eisentrager*? Are the charged crimes in connection with an armed conflict? Are those crimes violations of the Law of Nations?

Such questions assume additional importance today. Unlike earlier wars, the struggle against terrorism is potentially never-ending. The Constitution cannot countenance an open-ended Presidential power, with no civilian review whatsoever, to try anyone the President deems subject to a military tribunal, whose rules and judges have been selected by the prosecuting authority itself.

Amicus urges the Court to preserve the option of case-by-case review to assess jurisdiction. *Amicus* will also explain why this approach will be far less intrusive to the Executive Branch than are the claims made by the Petitioners.

ARGUMENT

I. THE COURT SHOULD NOT ADOPT A BLANKET APPROACH THAT PRECLUDES CASE-BY-CASE REVIEW FOR THOSE FACING COMMISSIONS.

Amicus does not dispute the President's power to detain enemy combatants in a time of war. However, the case for

civilian jurisdiction is at its apogee once the President decides to cross the threshold from detention and seeks to mete out justice in a calculated and deliberate fashion. This is a widely recognized principle of constitutional law, and nothing in *Eisentrager* is at odds with it. *Amicus* believes that the Court's resolution of the question presented, which is limited to "detention," need not, and should not, resolve whether civilian courts have jurisdiction over military commissions at Guantanamo. *Amicus* seeks nothing more than a recognition from this Court that the case for jurisdiction for those facing tribunals stands on a different, and stronger, footing than would a case brought by a detainee who has not been designated for military prosecution.

A. Those who face military commissions have the strongest case for civilian jurisdiction.

The colonists who wrote our Declaration of Independence penned, among their charges against King George, that "[h]e has affected to render the Military independent of and superior to the Civil Power"; "depriv[ed] us, in many Cases, of the benefits of trial by jury"; "made Judges dependent on his Will alone"; and "transport[ed] us beyond Seas to be tried for pretended Offences." THE DECLARATION OF INDEPENDENCE, para. 11, 20, 21 (U.S. 1776).

Those charges describe the United States' legal position in this case. The President here asserts the power to create a legal black hole, where a simulacrum of Article III justice is dispensed but justice in fact depends on the mercy of the Executive. Under this monarchical regime, those who fall into the black hole may not contest the jurisdiction, competency, or even the constitutionality of the military tribunals, despite the guarantee of habeas corpus, *see* U.S. Const., Art. I, § 9, cl. 2, and the right to such determinations by a "competent tribunal" under the 1949 Geneva Convention. The President's assertion of such absolute supremacy contravenes the bedrock principle that it is "the province and

duty of the judicial department to say what the law is," and the similarly "'settled and invariable principle * * * that every right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 177 (1803) (quoting Blackstone).[3] This Court has never given the President the ability to proclaim himself the superior or sole expositor of the Constitution in matters of justice.

Amicus does not dispute, in any way, the President's power to wage war. And, in the theatre of war, the President does not need congressional permission to decide how and when, within the laws of war, to take custody of enemy combatants upon their capture or surrender for the purpose of detention until the war ends and repatriation is possible. That is implicit in the Commander-in-Chief function itself.[4]

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[3] While this Court has accepted limits to judicial supremacy in foreign affairs, it has not done so in the context of military *trials* when Congress has not explicitly authorized a departure from civilian law. Here, Congress has said nothing in support of rescinding habeas corpus rights, and has said much against it in the statute's plain text. See *infra* pp.12-13. Congress' post-*Eisentrager* silence can hardly be deemed assent to the Government's over-reading of the case today--particularly given the very circumscribed basis for the *Eisentrager* holding. *See infra* pp. 12-21. *See also Reid*, 354 U.S., at 14 (plurality op.) (the concept that "constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates * * * would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended").

[4] *See* U.S. Const. art. II, § 2, cl. 1; Brief of Resp't United States in Opposition in *Hamdi v. Rumsfeld*, No. 03-6696, *cert. granted*, Jan. 9, 2004, at 14 (stating that the "detention of enemy combatants 'is neither punishment nor an act of vengeance,' but rather 'a simple war measure'" and that "the President's war powers include the authority to capture and detain enemy combatants at least for the duration of a conflict") (citations omitted); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture

(continued)

The moment the President ventures beyond detaining enemy combatants as war prisoners to actually adjudicating their guilt and meting out punishment, however, he has moved outside the perimeter of his role as Commander in Chief and entered a zone that involves judging and punishing. In that zone, the fact that the President entered wearing his military garb cannot obscure the fact that he is now pursuing a different goal—assessing guilt and meting out retrospective justice rather than waging war.

Concerns that the Executive has usurped the function of the Judiciary are at their height when the Executive seeks to deny access to a right as fundamental as habeas corpus. This right is part of our Constitution's "bulwark" against "tyranny," THE FEDERALIST No. 84, at 512 (Hamilton) (Rossiter ed., 1961); 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *134 (1765-69), and essential to the adversarial system. *See Castro v. United States*, No. 02-6683, slip op., at 3 (Dec. 15, 2003) (Scalia, J., concurring in part and concurring in the judgment).

B. This Court has required civilian courts to exercise jurisdiction over military commissions.

In the case of American civilians, this Court has extended jurisdiction to contest the constitutionality of, including Bill of Rights challenges to, military tribunals. *See Ex Parte Milligan*, 71 U.S. 2 (1866).

In the case of American servicemen, this Court has long held that, on habeas, the lawful power of tribunals can be challenged. *See In re Grimley*, 137 U.S. 147, 150 (1890) ("It

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is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated, or otherwise released.") (footnotes omitted).

cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and * * * may discharge him from the sentence."). Habeas is permissible to examine whether the tribunal: (1) is legally constituted; (2) has personal jurisdiction over the accused; and (3) has subject-matter jurisdiction to hear the offense charged. *Hiatt v. Brown*, 339 U.S. 103, 111 (1950).

In the case of enemy belligerents, *Ex Parte Quirin*, 317 U.S. 1, 25 (1942), held that "neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." The Court declined to hold that enemy aliens lack the ability to file habeas petitions, even though Attorney General Biddle opened his argument with that claim. *See id.* at 11 (reprinting argument). Moreover, the Court did not hold that the basis for jurisdiction was that the saboteurs decided to directly threaten the United States by landing on its shores instead of remaining abroad. To do so would have meant *rewarding* with special rights those who had infiltrated American soil. As enemy belligerents, they were not entitled to Fifth and Sixth Amendment rights. *Id.* at 45. Rather, *Quirin* offered the saboteurs the same habeas rights that were extended in *Grimley*. *See id.* at 48 (concluding that the President's "Order convening the Commission was a lawful order and that the Commission was lawfully constituted" and that "Charge I * * * alleged an offense which the President is authorized to order tried by military commission").

Similarly, in *In re Yamashita*, 327 U.S. 1, 9 (1946) (citations omitted), the Court permitted a convicted enemy belligerent, a Japanese Army General, to file a habeas petition:

> [W]e held in *Ex parte Quirin*, as we hold now, that Congress * * * has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive * * * could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.[5]

Amicus believes that its clients may stand in the same procedural position as General Yamashita, in that they may be labeled "enemy aliens" who contend that the "Constitution or laws" "withhold authority to proceed" with their trials. This Court's consideration of the petitioners' claims in *Quirin* and *Yamashita* stemmed not from any right gained by sneaking into America or from the fact that Yamashita was in territory that was subsequently regained by the U.S. Rather, jurisdiction stemmed from the fundamental principle recognized in cases from *Grimley* to *Milligan* and *Yamashita* to *Quirin*: We are a nation bound by law and claim no power to punish except that permitted by law.

C. *Johnson v. Eisentrager* does not preclude all jurisdiction over military commissions today.

1. *Eisentrager* permits filing habeas actions that challenge the lawfulness of proceedings.

In *Eisentrager*, the Court was presented with the claims of extraterritorial enemy aliens considered non-belligerents by the D.C. Circuit and as to whom the Circuit had extended

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[5] *See also id.* at 30 (Murphy, J., dissenting) ("This Court fortunately has taken the first and most important step toward insuring the supremacy of law * * * * Jurisdiction properly has been asserted to inquire 'into the cause of restraint of liberty' of such a person. 28 U.S.C. 452. Thus the obnoxious doctrine asserted by the Government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably.").

the right to trial by jury. 174 F.2d 961 (1949). While *Quirin* and *Yamashita* recognized that belligerents had the same right to challenge the lawfulness of a tribunal as American servicemembers, *Eisentrager* declined to extend the Bill of Rights to extraterritorial enemy aliens. As Part III explained, if the Fifth Amendment denied the military tribunal personal jurisdiction over the petitioners, then the Sixth Amendment would deny it to district courts, leaving the petitioners completely unpunished. 339 U.S., at 782-83.

Yet *Eisentrager* did not end at Part III. Rather, in Part IV the Court reached the merits of the commission's legality. In so doing, it quoted *Yamashita*'s key language, that "'We consider here only the lawful power of the commission to try the petitioner for the offense charged.'" *Id.* at 787.

This distinction between "lawful power" and Bill-of-Rights challenges undergirds the Court's heavy focus in Part II on the fact that Yamashita's case was brought from American territory, *Id.* at 780. In Parts II and III, the Court concerned itself with individual rights, in particular the Fifth and Sixth Amendments. But the Court in Part IV at no point invoked this discussion to justify rejection of the structural and jurisdictional challenges to the tribunals themselves. To the contrary, it quoted the foundational language from *Yamashita* where the Court held that it must consider such claims on habeas.

Eisentrager's approach in Part IV mirrored the system of military justice at the time, where despite the uncertainty about what Fifth and Sixth Amendment rights existed, habeas review was always present to examine whether the tribunals had "lawful power," meaning whether they were properly constituted and had personal and subject-matter jurisdiction. *See Grimley, supra; Hiatt, supra; Reaves v. Ainsworth*, 219 U.S. 296, 304 (1911). Ever since *Milligan*'s warning,[6] those latter inquiries have been the foundational questions that every Court has reached. This reading of *Eisentrager* also accords with the way the Court treated other claims by enemy aliens at the time.[7]

It is, of course, possible to read *Eisentrager* to stand for more than this, but doing so would be in considerable tension with the Court's unbroken treatment of challenges to the jurisdiction and composition of tribunals. Such a reading would also be in tension with *Eisentrager*'s recognition that those claiming citizenship were entitled to habeas review to "assure fair hearing of [their] claims to citizenship," *id.* at 769. If person *A* is entitled to habeas to decide whether she is a citizen (because being a citizen is so jurisdictionally important), then, so too, should person *B* get a habeas hearing to decide whether she is an enemy belligerent (since that status is of equivalent jurisdictional importance).

Such a reading of *Eisentrager* also squares with the unusual choice by Eisentrager's counsel to assert only one type of habeas jurisdiction, that for "being a citizen of a foreign state and domiciled therein * * * in custody for an

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[6] *See Milligan*, 71 U.S., at 124-25 (criticizing the view that a military commander can "punish all persons, as he thinks right and proper, without fixed or certain rules" because "if true, republican government is a failure, and there is an end of liberty regulated by law" and "destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power.'").

[7] For example, in *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court exercised jurisdiction over a claim made by an alien enemy "war bride" whom the Attorney General detained at Ellis Island without a hearing. Despite the fact that the detainee was born in Germany and labeled a security threat by the Attorney General, and despite the fact that she had not been admitted into the United States, this Court found jurisdiction to examine, on the merits, her claim that the President lacked the constitutional power to summarily exclude her. *Id.* at 542-44.

act done or omitted under any alleged * * * order or sanction of any foreign state, or under order thereof, the validity and effect of which depend upon the law of nations." 28 U.S.C. 2241 (c)(4). *See also* Br. for Resp't, *Johnson v. Eisentrager*, at 2 (reprinting statute involved and only reprinting (a) and (c)(4)); *Id.* at 24-26 (making argument based solely on (c)(4)). Lothar Eisentrager thus stood in a different position from Tomoyuki Yamashita, for Yamashita asserted a (c)(3) claim, that his trial violated the Constitution and laws.

As such, Eisentrager could not benefit from, and this Court did not confront the possible tension with, *Yamashita*'s foundational claim reprinted at pp. 8-9, *supra*. *Yamashita* built on the bedrock of *Ex Parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1867), where this Court observed that the habeas corpus statute "is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or law. It is impossible to widen this jurisdiction." Mr. Eisentrager's decision to assert only jurisdiction predicated on "the law of nations" led this Court to analogize his claim to the private-law disputes the New York courts rejected during the war of 1812. *See Eisentrager*, 339 U.S., 776-777.

The tactical choice by Mr. Eisentrager's counsel to place all his eggs in one jurisdictional basket cannot bind later individuals who seek to pursue other avenues for jurisdiction, particularly claims that a person "is in custody under or by color of the authority of the United States or is committed for trial before some court thereof," 28 U.S.C. 2241(c)(1); *or* "is in custody in violation of the Constitution or laws or *treaties* of the United States," (c)(3) (emphasis added); *or* "[i]t is necessary to bring him into court to testify or for trial," (c)(5). In each, the plain text of the habeas statute clearly permits the filing of habeas actions by those who face commissions. While some of the *dicta* in *Eisentrager*

appear to reach more than (c)(4), the Court in that case had absolutely no occasion to revisit, question, or even consider the other possibilities for jurisdiction that were at issue in *Yamashita* and earlier cases.[8] The claims today will go to the heart of constitutional law, and cannot be analogized to 190-year-old private-law disputes in New York state courts.

2. *Eisentrager*'s analysis depended on the declaration of war.

A declaration of war is a commitment of all national resources to a particular cause.[9] While lesser forms of authorization unquestionably suffice for the President to

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[8] The Court has stated with respect to Courts-Martial that doubts should be resolved in favor of civilian jurisdiction. *See United States ex rel Toth v. Quarles*, 350 U.S. 11, 14 (1950) ("There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."); *see also Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1868) ("the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States, and this tendency, except in one recent instance, has been constant and uniform"); *Price v. Johnson*, 334 U.S. 266, 283 (1948) ("the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ."), *overruled on other grounds in McCleskey v. Zant*, 499 U.S. 467 (1991).

> [9] [T]he state of war between the United States and the Government of Germany * * * is hereby formally declared; and the President is hereby authorized and directed to employ the *entire* naval and military forces of the United States and the *resources of the government* to carry on war against the Government of Germany; and, to bring the conflict to a successful termination, *all of the resources of the country* are hereby pledged by the Congress of the United States.
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> J. Res., Dec. 11, 1941, Pub. L. 77-331, 55 Stat. 796, 796 (emphasis added).

conduct military operations, blanket restrictions on liberty are altogether different. This is why *Eisentrager* was so influenced by the 1798 Alien Enemy Act, now codified at 50 U.S.C. 21, which authorized the detention and removal of alien enemies and precluded nearly all subsequent judicial review. The Court found that only a formal declaration of war would trigger the Act. *Id.* at 775 (stating that the Act is applicable ' whenever a 'declared war' exists"). In other contexts, the Court has interpreted it in precisely this way.[10]

Nothing even close to the authorization of World War II is present today. The recent Congressional Resolution permits only the use of "force"; applies only to those involved in some way in the September 11 attacks; and then extends only to the "prevent[ion of] * * * future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224, 224 (2001). Congress carefully avoided using the word "war."[11] Without that crucial language, the President today lacks what the Court

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[10] *E.g., Ludecke v. Watkins*, 335 U.S. 160, 166 n.11 (1948) (rejecting the view that the legislative history of the Alien Act shows that "declared war" meant "state of actual hostilities"); *United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347, 348 (1952) ("The statutory power of the Attorney General to remove petitioner as an enemy alien ended when Congress terminated the war with Germany."); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1402 (1992) (describing the Alien Act and stating that "a formal declaration of war" is "valuable" because it "forces Congress to acknowledge publicly, and to accept, that one cost of waging war is that individual liberty in the United States might have to suffer").

[11] Rep. Conyers, for example, stated that "[b]y not declaring war, the resolution preserves our precious civil liberties" and that "[t]his is important because declarations of war trigger broad statutes that not only criminalize interference with troops and recruitment but also authorize the President to apprehend 'alien enemies.'" 147 CONG. REC. H5638, H5680 (daily ed. Sept. 14, 2001); *see also id.* at H5653 (statement of Rep. Barr) (arguing that "[w]e need a declaration of war" from Congress to "[g]ive the President the tools, the absolute flexibility he needs").

had before it in *Eisentrager*, the clear statement by *both* political branches as to the curtailment of rights of aliens.

At bottom, the President's argument is one of severe constitutional informality. The President asserts, despite clear-statement principles, not only that (1) vague statutes can be stretched to provide authority for commissions, but also that (2) Congress need not declare war to strip civilian review altogether.[12] Even if the first proposition might be thought to follow from *Quirin*, the second does not, and creates an unconstitutional delegation of power. *See Clinton v. City of New York*, 524 U.S. 417, 449-53 (1998) (Kennedy, J., concurring); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting).[13]

Again, *Amicus* in no way challenges the President's prerogative to launch military operations without a formal declaration. But the broad latitude the President has by dint of that power does not extend to the rather different function of pursuing justice. The Court has never approved a wholesale deprivation of the ability to challenge in civilian courts the very jurisdiction of a commission when war has not been declared. To insist on that declaration, or an

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[12] *Yamashita* itself insisted on the formality of war at several times in discussing the lawfulness of commissions. *E.g.*, 327 U.S., at 11-12 (stating that "the authority sanctioned by Congress to administer the system of military justice recognized by the law of war * * * is without qualification * * * so long as a state of war exists--from its *declaration* until peace is proclaimed") (emphasis added); *Id.* at 12 ("No writer on international law appears to have regarded the power of military tribunals * * * as terminating before the formal state of war has ended.").

[13] Such an interpretation would leave the President free to define a "time of war," grant him the discretion to set up tribunals at will, bestow upon him the power to prosecute whomever he selects, vest him with the authority to label something an offense and to try an offender for it, give him the power to try those cases before military judges serving as part of the executive branch, and empower him to dispense with habeas review.

emergency that truly precludes congressional suspension of the writ, does not shackle the President's war powers; it simply reaffirms the principle that justice is to be pursued according to duly enacted law. Here, the only relevant law is the Alien Act, and that Act requires a declared war.[14]

There is an additional reason why the *Eisentrager* Court so strictly confined its analysis. Unlike today, where military commissions have not begun, that Court faced a situation in which hundreds of thousands of cases already had been tried in American commissions by the time of Lothar Eisentrager's petition.[15] The Court confronted severely entrenched interests—with over 400,000 cases possibly reopened—an entrenchment that makes the interest in cases like *Herrera v. Collins*, 506 U.S. 390, 401-03 (1993) look trivial by comparison.[16] Yet today none of these problems exists

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[14] The Government's claim that declarations of war are no longer in vogue internationally is therefore beside the point. The relevant issue is the suspension of rights, not the ability to fight wars. (And we note the peculiarity of the Government, which has taken positions against relying on customary international law, *e.g.*, Petition for Certiorari in *Sosa v. Alvarez-Machain*, No. 03-339, *cert. granted* Dec. 1, 2003, at 24, now relying on contemporary international law when the Constitution and statutes say otherwise.) It is the law of the United States that decides this matter.

[15] *See* Br. of United States, *Johnson v. Eisentrager*, [hereinafter "U.S. *Eisentrager* Br."] at 54-55 ("The extraordinary nature of the burden that would fall on the local District Court under the decision below is suggested by the fact that nearly 400,000 cases were tried by American Military Government Courts *alone* in the American occupation zone of Germany *alone* between September 1944 and August 1948"); Cert. Pet'n of United States Gov't, *Johnson v. Eisentrager*, at 14 ("several hundred thousand cases have been tried in Germany, Japan, and Italy by military government courts and other American-manned tribunals since United States troops first occupied those enemy countries in World War II").

[16] *Eisentrager*'s holding also squared with the statute for habeas corpus in the District of Columbia, 16-801. Section 16-801 "expressly limits the local district court's jurisdiction to issue such writs to cases of restraint 'within the District.'" U.S. *Eisentrager* Br., *supra*, at 9. The Government there

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because the Government has proceeded cautiously. A prospective decision by this Court to confer limited case-by-case review to decisions by commissions would have none of the overtones of the *fait accompli* that reached this Court in 1950. Moreover, if later events necessitate change, Congress can modify the habeas statute accordingly.

3. *Eisentrager*'s holding was confined to field tribunals, not manipulation of locale.

Eisentrager placed particular emphasis on the fact that the petitioners had been "captured outside of our territory and there held in military custody as a prisoner of war." 339 U.S., at 777. Strong justification exists for this holding, as the President's hands should not be tied on the battlefield, particularly when the territory is under the control of many nations. And so, for example, an international tribunal for former President Saddam Hussein in Iraq would not be a matter that the American courts could review.

But when justice is administered off the battlefield, and particularly in those places where no other nation offers legal remedies, the situation shifts.[17] In those areas, the fear

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argued that the D.C. courts had denied jurisdiction in similar cases, including one from a military tribunal at Nuremberg, Germany. *Id.* at 22-23. But on Sept. 1, 1948, after Mr. Eisentrager filed his April 26, 1948 habeas petition, the District Court for the District of Columbia was made an integral part of the federal judicial system. *See* 62 Stat. 992 (1948).

[17] Unlike *Eisentrager*, where the Government claimed "enemy aliens in enemy lands are not subject to duties under the American Constitution and laws, and * * * * like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them under their country's present laws and government," U.S. *Eisentrager* Br. *supra*, at 67, there appears to be no inclination whatsoever to let Cuban law apply to those facing military tribunals. Deference to local practices (as in Puerto Rico or the Philippines, *see Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904)) is not compatible with American policy.

of interfering with battlefield operations is at its nadir. The likelihood that the decisions are being made on the spur of the moment in the midst of crisis drops precipitously, while the likelihood that the key decisions are being made in the continental United States increases. *See* U.S. *Eisentrager* Br., *supra*, at 23 (distinguishing cases where courts found habeas jurisdiction over extraterritorial prisons in Lorton and Occoquan, Virginia by stating that "these institutions were controlled and staffed by District officials").[18]

In this sense, the Government's reading of *Eisentrager* is both under- and over-inclusive. Its reading would extend habeas rights to those, such as the Nazi saboteurs, who lack any connection to this country beyond a surreptitious entrance, but deny habeas to those who have done far less (and perhaps no) damage to American interests. The Constitution cannot be contorted into this senseless position without doing grave damage to the rule of law.

There is no direct precedent on this issue because, so far as *Amicus* is aware, the American Government has never before consciously created a trial process, courtroom, and other accoutrements of judicial process outside the battlefield and housed them all in an area calculated to divest civilian jurisdiction.[19] The most direct precedent comes

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[18] The establishment of the military commissions (such as its staffing, the selection of procedural rules, and the defining of war crimes), the choice over where to hold and try those subject to them, and the decision to name (at present) six individuals as potential subjects have all been made by Respondents while they were within this Court's jurisdiction.

[19] Seven years after *Eisentrager*, a plurality of this Court observed: "We have examined all of the cases of military trial of civilians by the British or American Armies prior to and contemporaneous with the Constitution that the Government has advanced or that we were able to find by independent research. Without exception, these cases appear to have involved trials during wartime in the area of battle - 'in the field' - or in occupied enemy territory." *Reid*, 354 U.S., at 34 n.60. The Court's pro-

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from 1660s England, where Lord Clarendon shipped prisoners to military "garrisons" to evade habeas corpus.[20] Clarendon's actions, which became part of his impeachment trial, were rebuked by Parliament's 1679 Habeas Corpus Act, and form a crucial event in the development of the writ. In particular, the 1679 Act forbade a prisoner from being sent "into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter shall be *within or without* the dominions of his Majesty." 31 Car. 2, c. 2, § 12 (emphasis added). Even before the Act, English courts "had already been accustomed to send out their writ of habeas corpus into all places of peculiar and privileged jurisdiction, where this ordinary process does not run, and even to the island of Jersey, *beyond the strict limits of the kingdom of England*." 2 Hallam, The Constitutional History of England 178 (1846) (emphasis added); *see also id.* at 65.

Eisentrager also emphasized that "the scenes of their offenses * * * were all beyond the territorial jurisdiction of the United States." 339 U.S., at 778. Yet today, jurisdiction has been extended to acts of terrorism worldwide, including those against the U.S.S. Cole and those of Sept. 11, 2001.[21]

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nouncements about the validity of military tribunals have been confined in this way. *See, e.g.,id.* at 33-34 (discussing Japan and Germany); *id.* at 34-35; *Id.* at 26 n.44 ("In time of war the Common Law recognized an exception that permitted armies to try soldiers 'in the field.'").

[20] In 1667, Clarendon "was accused of sending persons to 'remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law, and to produce precedents for the imprisoning of any other of his majesty's subjects in like manner.'" 9 Holdsworth, History of British Law 116 (1926).

[21] Courts have extended jurisdiction to individuals who have never set foot on American soil, *e.g., United States v. Winter*, 509 F.2d 975, 982 (5th Cir. 1975) (finding jurisdiction over all conspirators even when some of them had never been in the United States).

See 18 U.S.C. 2331-38 (providing criminal and civil remedies against acts of "international terrorism" and stating that "the district courts of the United States shall have exclusive jurisdiction over an action brought under this chapter."). In *Eisentrager*, the offenses only existed within the laws of war. But today, the "scenes" of "offenses" may well be *within* "the territorial jurisdiction of the United States."

Crimes of terrorism are similar to Lamdin Milligan's offense of trying to overthrow the government, as to which this Court said there was "[n]o reason of necessity" for a military trial "because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them." 71 U.S., at 122. Conversely, crimes of terrorism are dissimilar to Lothar Eisentrager's offenses, for there the Court emphasized that he would go unpunished if a commission could not bring charges. *Eisentrager*, 339 U.S., at 782-83.

The Government's argument in this case has no logical stopping point. If there is no right to civilian review, the government is free to conduct sham trials and condemn to death those who do nothing more than pray to Allah.[22] The President's claim is for the absence of any legal restraint whatsoever on the government, commensurate with absolute duties and subjugation for those at Guantanamo.

The relief sought by Mr. Eisentrager, to be set free, itself was a claim with little logical stopping point.[23] But at

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[22] Were *Eisentrager*'s conception of "sovereignty" converted into the wholesale deprivation of liberty that the Government asserts, it would directly conflict with U.S. Const. Amend. XIII, which reaches not simply "the United States," but also "any place subject to their jurisdiction."

[23] *See* Pet'n for Writ, reprinted in *Johnson v. Eisentrager* App., at 7 (last line of petition asking "that the petitioner and the other prisoners be discharged from the offenses and confinement aforesaid"); Br. in Opp. by Eisentrager, *Johnson v. Eisentrager*, at 6 ("If the legal position taken by the respondent is correct, then the prisoners should be released as soon as

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present there may be far more limited claims, apart from detention, that individuals who face military trial may assert. The fact that Lothar Eisentrager yoked his broad claim for relief (freedom) to a weak jurisdictional theory ((c)(4)), cannot bind those who advance different arguments today.

II. POST-*EISENTRAGER* DEVELOPMENTS CONFER JURISDICTION FROM MILITARY COMMISSIONS.

In the aftermath of World War II, remarkable changes throughout the globe altered the legal landscape. The United States has signed any number of treaties that modify previous statutes. The Government has extended its law extraterritorially. The UCMJ has been globalized. And habeas looks quite different than it did in 1950. Yet the Government relies on the antiquated environment of *Eisentrager*, instead of addressing the world as it exists today.

The Geneva Conventions. Eisentrager adopted a nineteenth-century conception of warfare in which the entire nation was at war. *See* 339 U.S., at 772 ("in war `every individual of the one nation must acknowledge every individual of the other nation as his own enemy.'" (quoting *The Rapid*, 8 Cranch 155, 161 (1814)).[24] Under this conception, there are no civilians with "distinct and individual legal

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possible"); Pet'n for Cert. by United States Gov't, *Johnson v. Eisentrager*, at 5 ("In affording enemy aliens access to our courts to test their *detentions* by American officials any place in the world, the decision below is obviously of far-reaching importance") (emphasis added).

[24] Francis Lieber, Laws of War: General Orders No. 100, Sec. I, Art. 20 (1863) ("Public war* * * is a law and requisite of civilized existence that men live in * * * states or nations, whose constituents bear, enjoy, suffer, advance, and retrograde together, in peace and war"). *See also The Rapid*, 8 Cranch, at 160-61 ("In the state of war, nation is known to nation only by their armed exterior * * * * The individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion. If they meet it is only in combat.")

personalities * * * * No one can pretend that he or she just happened to be caught living as an accidental German or Frenchman when the two countries go to war. The nation at war suffers and prospers as an organic entity."[25] This view led the New York courts cited in *Eisentrager* to conclude that wartime non-resident enemy aliens lack access to American courts in private-law disputes. *See Bell v. Chapman*, 10 Johns. 183 (N.Y. 1813); *Jackson v. Decker*, 11 Johns. 418 (N.Y. 1814); *Clarke v. Morey*, 10 Johns. 69 (N.Y. 1813).

But these comparisons will often fail today. Some of those who face military commissions are nationals of countries at peace with the United States. Others are alleged to be part of the stateless al Qaeda network. To transmute the concept of "enemy alien" outside of its state-centered focus is to extend the concept far beyond its nineteenth-century moorings. Membership in a nation with which we are at war sets a logical stopping point to the enemy-alien doctrine; to expand it more broadly means that the government is free to label virtually any person on the globe an enemy alien and deprive recourse to the civil courts.

The nineteenth-century version contained built-in remedies--enemy nations could sign peace treaties or take other actions to protect their citizens who faced military commissions. That fact explains why the War of 1812 cases, upon which *Eisentrager* relied, held that "the disability of the plaintiff is but temporary in its nature, (for a state of perpetual war is not to be presumed)," and that there was no "bar to a new action on the return of peace." *Chapman*, 10 Johns., at 184. But when the concept is stretched to encompass all aliens who are affiliated with any stateless "enemy," those protections and temporal limits evaporate.

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[25] Fletcher, *Black Hole in Guantanamo Bay*, J. Intl. Crim. Just., Jan. 2004. Some analysis that follows is derived from this Article.

Indeed, the Government's argument winds up trying to extend nineteenth-century notions of warfare to a twenty-first century that repudiated those notions in the latter part of the twentieth one. After the 1949 Geneva Conventions, ratified after *Eisentrager*, the new emphasis on civilians as protected persons precludes thinking that the nation goes to war as an organic unit. And this underscores, again, the need for case-by-case adjudication. Some facing tribunals may claim that they are not "enemies," others that they are from allied nations, and still others that they are civilians entitled to all of the relevant protections of this century.

This is not a claim for the "self-execution" of the Geneva Convention. The President has himself made international law binding as to the rules for military commissions.[26] And

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[26] Nearly one year after the *Eisentrager* decision, in May, 1951, the President promulgated the Manual for Courts-Martial, which provides: "Subject to *any* applicable rule of international law or any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial." Part I, ¶2(b)(2) (emphasis added).

Amicus expects to make two other claims, neither of which depends on "self-execution," and it respectfully requests that this Court leave the door open for their case-by-case review. *First*, the only way to understand what the "laws of war" mean is by referring to the Geneva Conventions. *See* Const., Art. VI, cl. 2 (defining "supreme law of the land as including "treaties"). *Quirin* defined the term "unlawful combatant" by looking to the definition of combatancy in the 1907 Annex to the Hague Convention. 317 U.S., at 34-38. *Yamashita* directly relied on the words "commanded by a person responsible for his subordinates" in the 1907 Annex to explain why the General's actions constituted a war crime, 327 U.S., at 15-16. It then interpreted Article 60 of the 1929 Geneva Convention to not require a Court-Martial. *Id.* at 23-24. At no point was there any discussion of self-execution because in this unique area, where common-law law-of-war principles are constantly incorporated, there is absolutely nothing unusual about looking to international law. Indeed, the Geneva Conventions rip asunder the nineteenth-century conception of warfare, whereby every citizen of a state at war with another is enti-

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the 1949 Conventions directly reverse a key part of the *Eisentrager* reasoning, for the Court feared that "we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands. The right of judicial refuge from military action * * * can purchase no equivalent for benefit of our citizen soldiers," 339 U.S., at 779. But since that time, most every nation on earth has adopted the Conventions, and one of their guarantees is a "competent tribunal" to determine whether someone is a prisoner of war in cases of doubt. The propriety and need for review is particularly acute when an individual has been neutralized as a combat threat. See Geoffrey Best, War and Law Since 1945, at 348-49 (1994). At this moment in time, the world order, and treatment of citizen soldiers, looks startlingly different than it did in the immediate aftermath of World War II.

Congress Has Divested the President From the Ability to Define Crimes of War. *Quirin* recognized that a court must in-

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tled to no rights. Rather, the Conventions mandate the use of procedural justice despite the needs of modern war, and reveal an international consensus that not all rights can be eliminated, particularly when doubt exists as to whether someone is a prisoner of war.

Second, the Geneva Conventions, which were ratified after the UCMJ, condition the way in which that Code (and its limited recognition of military commissions) operates. Under the last-in-time rule, when a treaty is subsequent to congressional action, the treaty controls. *See Reid*, 354 U.S., at 18 n.34 (plurality op.) ("By the constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation* * * * (I)f the two are inconsistent, the one last in date will control the other." (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)); *Cook v. United States*, 288 U.S. 102 (1933). In *Cook*, this Court found that a treaty negotiated with Great Britain in 1924 regarding the twelve-mile territorial limit on seas trumped a statute from 1922 (and even though Congress reenacted the statute in 1930). *Cook* also held that statutes enacted after treaties cannot trump those treaties without a clear statement. *Id* at 120. *See also Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains").

quire "whether it is within the constitutional powers of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged," 317 U.S., at 29. The first part of such an inquiry is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial." *Id.*

With respect to what constitutes a violation of the law of war, "Congress ha[s] the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts." *Id.* at 30. In *Quirin*, Congress chose not to define such offenses, and this led the Court to approve the common-law path of the tribunal. *Id.*

In the War Crimes Act of 1996, however, Congress chose to define those very offenses. *See* 18 U.S.C. 2441; H.R. Rep. No. 104-698. Congress later amended 2441 by passing the Expanded War Crimes Act of 1997.[27] As a result of these Acts, a "war crime" means "any conduct" that, *inter alia*, is a "grave breach" of the 1949 Geneva Conventions, any "violation of common Article 3" of the same convention, as well as violations of certain other treaties.

Thus, Congress has "crystallize[ed] in permanent form

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[27] The 1997 amendment intentionally broadened the statute to encompass all acts recognized by both the United States and international law as war crimes. *See* H.R. Rep. No. 105-204 at 3; 143 Cong. Rec. H5865-68, 66 (July 28, 1997) (statement of Rep. Jones). Its expanded form "include[s] violations of any convention signed by the United States." *Id.* at H5866 (statement of Rep. Lofgren). The amendment "rectif[ied] the existing discrepancies between our Nation's intolerance for war crimes and our inability to prosecute all war criminals." *Id.* at H5866-67 (statement of Rep. Jones). The expansiveness of the coverage prompted concern that jurisdiction would broaden automatically when the United States joined another law of war convention. *Id* at H5867 (statement of Rep. Conyers).

and in minute detail every offense against the law of war."[28] It is likely that a future court will be required to address the precise question asked in *Quirin* (that the specific charges are not cognizable before military tribunals). At no point in the crystallization of these offenses did Congress try to divest the courts of habeas jurisdiction to hear such claims.

Other Sovereign Territory. This Court emphasized that the *Eisentrager* plaintiffs "at no relevant time were within any territory over which the United States is sovereign, and * * * their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U.S., at 778. Once the facts are revealed through trial by commission, some today may be shown to have been in sovereign American territory. Because so little is known about their capture and subsequent handling, it is only possible to give an illustration at present: The likelihood that some facing tribunals were housed, transported, and interrogated aboard American vessels or aircraft.

Vessels belonging to the United States are deemed an extension of the sovereignty of the United States. *United States v. Rodgers*, 150 U.S. 249, 260-65 (1893); *United States v. Flores*, 289 U.S. 137, 155-56 (1933). This is particularly true for military warships. *United States v. Collins*, 7 M.J. 188 (C.M.A. 1979); *cf. Kinnell v. Warner*, 356 F. Supp. 779 (D. Hawaii 1973).[29] Those facing tribunals were likely transported to Guantanamo via military vessels and aircraft, and perhaps held or interrogated on them for lengthy periods. If so, the detainees would be within American sovereignty during a relevant period of their captivity, irrespective of the status

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[28] The General Counsel of the Department of Defense promulgated a list of offenses for commissions. Instruction No. 2, 68 Fed. Reg. 39381 (2003). That list differs substantially from Congress' enumeration in § 2441.

[29] Consistent with this principle of sovereignty, Congress has recognized jurisdiction over vessels and aircraft. 18 U.S.C. 7 (2003).

of Guantanamo itself as sovereign American territory. *See Gherebi v. Bush*, 2003 WL 22971053 (9th Cir.Dec. 18, 2003).

The adoption of the Uniform Code of Military Justice. The UCMJ took effect on May 31, 1951, nearly one year after the June 5, 1950 *Eisentrager* decision. *See* 10 U.S.C. 801-940 (1952 ed. Supp. V). The Code is the result of painstaking study and reflects an effort to reform the system from top to bottom. *Burns v. Wilson*, 346 U.S. 137, 141 (1953) (plurality op.). With this complete revision of the Articles of War came the expansion of Article 2, in 10 U.S.C. 802(12), which identifies additional persons who are subject to the Code:

> Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

Paragraph 12 thus represents a clear break from *Yamashita*, where this Court stated that "neither Article 25 nor Article 38 is applicable" because "Article 2 of the Articles of War enumerates 'the persons * * * subject to these articles.'" 327 U.S., at 19; *see also id.* at 20 (stating that Article 2 does not cover Yamashita). Unlike the old Article 2, which only covered "members of our own Army and of the personnel accompanying the Army," *id.* the new ¶12 extends jurisdiction to "persons within" leased areas without limitation.[30]

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[30] As proposed and ultimately adopted, ¶12 was criticized for being much more expansive than its predecessor, 34 U.S.C. 1201. In his Senate testimony, Maj. Gen. Thomas Green, the Army Judge Advocate General, argued "Article 2 (12) is not limited to time of war or national emergency, nor does it exclude purely military offenses. Its effect would be to make subject to military law, without limitation or qualification, any

(continued)

The Government now finds itself in the very situation that some feared when the UCMJ was drafted. Under ¶12, all of the detainees currently being held at Guantanamo are subject to the Code, for the Naval Base is leased by the United States and under the control of Secretary Rumsfeld. Therefore, any detainee taken to a military tribunal would necessarily be entitled to the protections provided for in the UCMJ, including potential review by civilian courts.

While the UCMJ applies to persons at Guantanamo, the practical consequences will be limited because much of it does not govern detentions.[31] The UCMJ will provide, however, some procedural guarantees to those prosecuted before commissions. *See* 10 U.S.C. 810 (speedy trial); 10 U.S.C. 837 (unlawfully influencing tribunal); and 10 U.S.C. 855 (cruel and unusual punishment).

Habeas Rights for American Citizens Overseas. At the time of *Eisentrager*, American courts were skeptical of habeas claims filed by citizens overseas. In *Eisentrager*, the Government went so far as to say that "*Neely v. Henkel*, 180 U.S. 109 (1901), held the constitutional provision as to habeas corpus inapplicable to an American held in American-occupied Cuba after the War of 1898. The circumstances of that case are *entirely comparable* to those presented by the current occupations of enemy territory, and citizens now detained overseas are equally without the constitutional

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person residing in or visiting a base area at any time. The enactment of a statute conferring such sweeping jurisdiction over foreign nationals whose only connection with the armed forces might be that they are native or residents of an area leased to the United States, will inevitably lead to international complications." Statement of Major General Thomas H. Green, U.S. Senate, Cmte. on Armed Services, May 9, 1949, at 266. Despite this criticism, ¶12 was adopted without the limitations in § 1201.

[31] With limited exceptions, provisions of the UCMJ generally apply to courts-martial, other procedures which the detainees will never be involved in, or administrative matters that are irrelevant to the detainees.

right to invoke the writ." U.S. *Eisentrager* Br., *supra*, at 15 (emphasis added). But this legal conception has been eliminated by *Reid v. Covert*, *supra*, and *Burns v. Wilson*, *supra* (permitting the district court in Washington, D.C., to hear a habeas petition filed by United States citizens confined in Japan after being found guilty of rape and murder in Guam). And if the Government's comparison in *Eisentrager* is correct, then those cases have undermined whatever remains of *Eisentrager* today.[32]

Next Friend. The Government has represented that petitions can be filed by those who are inaccessible:

> In accordance with the writ's common law history (*see Whitmore v. Arkansas*, 495 U.S. 149, 162-163 (1990), the habeas statute expressly contemplates that a detainee may be inaccessible, and thus authorizes a proper next-friend to bring an action on a detainee's behalf * * * * Thus, appointment of a next friend serves as a mechanism by which an otherwise unavailable detainee - including an 'inaccessible' (*ibid.*) detainee - may effectively gain access to the courts* * * * That is a traditional function of the next-friend doctrine in habeas actions * * * *

Br. of United States in Opp. in No. 03-6696, *Hamdi v. Rumsfeld*, at 35. *Amicus* expects those prosecuted in tribunals to bring such petitions, as the Government has suggested.[33] In

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[32] *Eisentrager*, 339 U.S., at 778, also built from *Ahrens v. Clark*, 335 U.S. 188 (1948). The case cannot be divorced from the general limitation of the time that habeas was confined to petitioners and custodians who were in the district. *See* U.S. *Eisentrager* Br., *supra*, at 51. These limitations have since eroded, *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 498 (1973).

[33] Next-friend standing has been used when the detained party has been in Korea, and the American doctrine developed out of an English statute

(continued)

Eisentrager, the Court had no occasion to address the issue because the only "next friend" mentioned in the Petition was a person outside the jurisdiction, namely, Lothar Eisentrager himself. Pet'n for Writ, *Johnson v. Eisentrager*, App. 2.

III. HABEAS ACTIONS THAT CONTEST ASPECTS OF MILITARY COMMISSIONS DO NOT THREATEN PRESIDENTIAL DEFENSE RESPONSIBILITIES.

The United States justifies much of its position by focusing on the President's military responsibilities and this Court's limited role in that arena. *Amicus* agrees with many of these claims and does not question the President's ability to detain enemy combatants until the cessation of hostilities when the Executive Branch deems it appropriate. However, when the President sets up a parallel system of justice off the battlefield to try crimes, that action does not fall within the President's defense function.

Permitting those targeted by military commissions to file habeas petitions would not threaten the President's responsibility to protect the nation because the President would always retain the detention power. It is only the far broader step, sought by Petitioners, to permit Article III courts to become forums for *en masse* Bill-of-Rights challenges to detentions that may conceivably do so. This Court can reject that broad step, but still permit the filing of habeas petitions that challenge the jurisdiction and lawfulness of a military commission, without restricting the President's defense responsibilities at all.

Respectfully submitted,

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that "authorized complaints to be filed by '*any* one on * * * behalf' of detained persons." *Whitmore*, 495 U.S., at 162 (citations omitted).

Lieutenant Colonel
Sharon A. Shaffer
Lieutenant Commander
Charles Swift
Lieutenant Commander
Philip Sundel
Major Mark A. Bridges
Major Michael D. Mori
Office of Military
Commissions
1931 Jefferson Davis Hwy.
Suite 103
Arlington, VA 22202
(703) 607-1521

Neal Katyal
Counsel of Record
600 New Jersey Ave.,
Northwest
Washington, DC 20001
(202) 662-9000

January 14, 2004

Nos. 03-343, 03-334

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF 175 MEMBERS OF BOTH HOUSES OF THE PARLIAMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

EDWIN S. MATTHEWS, JR.
Counsel of Record
EDWARD H. TILLINGHAST, III
DAMION K. L. STODOLA
COUDERT BROTHERS LLP
1114 Avenue of the Americas
New York, New York 10036
212-626-4400

PETER CARTER QC
18 Red Lion Court
London EC4A 3EB
44-20-7520-6000

JEREMY CARVER, CBE
CLIFFORD CHANCE LLP
10 Upper Bank Street
London E14 5JJ
44-20-7006-1000

LORD LESTER OF HERNE HILL QC
DAVID PANNICK QC
BLACKSTONE CHAMBERS
Blackstone House
Temple
London EC4Z 9BW
44-20-7583-1770

Attorneys for 175 Members of both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland

January 14, 2004

* Amici Curiae *listed on the Reverse*

Members of the House of Lords:

Lord Ahmed, Lord Alderdice, Lord Alexander of Weedon QC, Lord Alli, Lord Archer of Sandwell QC, Lord Avebury, Lord Berkeley, Lord Bhatia, Lord Bowness, Lord Brennan QC, Lord Brittan of Spennithorne QC, Lord Brooke of Sutton Mandeville, Lord Browne-Wilkinson, Lord Campbell of Alloway QC, Lord Donaldson of Lymington, Lord Dubs, Lord Elton, Viscount of Falkland, Lord Faulkner of Worcester, Lord Freyberg, Lord Goff of Chieveley, Lord Goodhart QC, Lord Grabiner QC, Lord Greaves, Lord Grenfell, Lord Hannay of Chiswick, Lord Haskins, Baroness Hayman, Lord Holme of Cheltenham, Earl of Home, Lord Hylton, Baroness Jay of Paddington, Lord Joffe, Lord Judd, Baroness Kennedy of the Shaws QC, Lord Lloyd of Berwick, Baroness Ludford, Lord Mackay of Drumadoon, Lord Maclellan of Rogart, Baroness Maddock, Lord Methuen, Baroness Miller of Chilthorne Domer, Lord Morgan, Lord Mustill, Baroness Northover, Lord Ouseley, Lord Bishop of Oxford, Lord Phillips of Sudbury, Lord Plant of Highfield, Lord Puttnam, Lord Razzall, Lord Rea, Lord Redesdale, Baroness Rendell of Babergh, Lord Renton QC, Baroness Richardson of Calow, Lord Roper, Lady Saltoun of Abernethy, Earl of Sandwich, Baroness Sharp of Guildford, Lord Sheldon, Lord Shutt of Greetland, Lord Skidelsky, Lord Steel of Aikwood, Lord Stoddart of Swindon, Lord Taverne QC, Lord Thomas of Gresford QC, Baroness Thomas of Walliswood, Lord Tope, Baroness Uddin, Lord Wallace of Saltaire, Baroness Walmsley, Baroness Whitaker, Baroness Wilkins, Baroness Williams of Crosby, Lord Bishop of Winchester, Lord Bishop of Worcester, and Lord Wright of Richmond

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INTEREST OF *AMICI CURIÆ*[1]

Each of the *amici curiæ* is a serving member of one of the two Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland: the House of Commons and the House of Lords.[2] Each regards the question before the Court[3] as an issue of fundamental importance to the individual rights not only of British nationals, residents, and refugees, but of all detainees in Guantánamo.

Amici assert neither the guilt nor innocence of those detained at Guantánamo Bay, and do not ask this Court to rule one way or another on any claim or charge that may be raised in future proceedings. *Amici* submit only that, under the rule of law, the detainees should be granted the due process safeguard of independent judicial review, and do not speculate as to the outcome of any such proceedings. As members of the Parliament of Westminster, *amici* have a duty to protect human rights and fundamental freedoms against the misuse of public power. They have a significant, legitimate interest in seeking to ensure that their fellow citizens and others be accorded the due process of law deeply rooted in Anglo-American legal and political heritage.[4]

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, nor did any party to the action before the Court, or any person or entity other than the undersigned *amici*, make a monetary contribution to the preparation or submission of this brief.

[2] All *amici* participate in this brief as parliamentarians, and not as former cabinet members, senior judges, serving bishops, or any other capacity they may occupy or have occupied.

[3] The question presented before the Court is: whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

[4] *Amici* do not believe it is appropriate for them to opine on the measures taken or not taken by the executive branch of the United

Amici recognize the concern expressed in Rule 37(1) that unnecessary *amicus curiæ* briefs are a burden. Upon belief, this is the first time members of the Parliament of Westminster have submitted a brief to this Court. This brief reflects the profound concern they share for the central question before the Court.[5]

Their concern is not limited to the twelve individuals entitled to the international protection of the United Kingdom or to the nationals of other states detained without recourse to even the most basic legal rights. The exercise of executive power without possibility of judicial review jeopardizes the keystone of our existence as nations—namely, the rule of law—as well as the effective protection of human rights as a matter of international obligation. Accordingly, *amici curiæ* submit this brief in

States government. They acknowledge the constitutional authority generally of the executive branch to issue executive orders—a power similar to that of the British government to act under the Royal Prerogative. The Houses of Parliament scrutinize the manner in which the government exercises such powers, and Britain's courts review the lawfulness of government conduct under an increasing variety of circumstances, even when that conduct takes place under prerogative powers.

[5] Members of Parliament have repeatedly articulated these sentiments to Her Majesty's Government, which has committed diplomatic effort and resources to protect the due process rights of the detainees. Prime Minister Tony Blair assured the House of Commons that "[w]e will make active representations to the United States . . . to make absolutely sure that any such trial will take place in accordance with proper international law." 408 PARL. DEB., H.C. (6th ser.) (2003) 1151-52. Minister of State, Foreign and Commonwealth Office, Baroness Symons of Vernham Dean, assured the House of Lords that it is the Government's objective to "ensure that if any British nationals are detained at Guantánamo Bay and prosecuted, a fair trial takes place in accordance with generally recognised principles." 653 PARL. DEB., H.L. (5th ser.) (2003) 938. Members of Parliament have employed every potential avenue to voice concern for the British detainees and turn now to this Court as an alternative, independent route to ensure that due process is provided.

support of the petitioners Shafiq Rasul, *et al.*, and Fawzi Khalid Abdullah Fahad Al Odah, *et al.*

CIRCUMSTANCES OF UNITED KINGDOM NATIONALS DETAINED IN GUANTÁNAMO

The Factual Context

Amici submit the following facts to this Court to underscore the need for independent judicial examination of the factual and legal bases justifying the indefinite confinement, without trial, of the detainees in Guantánamo.[6] These untested facts are the only facts that have reached the public record. If complete and compelling information about the detainees is not available and before this Court, it is because the U.S. administration and military have kept this information secret for the past two years and excluded all detainees from the benefit of due process.[7]

In early January 2002, U.S. Armed Forces began transferring individuals held as prisoners overseas to the U.S. naval base at Guantánamo Bay, an area within the complete control and jurisdiction of the United States.[8] It is reported that approximately 660 prisoners from 42 coun-

[6] On this Court's consideration of facts and opinions, *see, e.g., Atkins v. Virginia*, 536 U.S. 304, 316 n.19-21 (2002) (acknowledging websites, newspaper articles, and polling data); *Groppi v. Wisconsin*, 400 U.S. 505, 510-12 (1971) (finding error in trial court's failure to take requested judicial notice of prejudicial pretrial publicity in misdemeanor case); *Muller v. Oregon*, 208 U.S. 412, 419-20 (1908) (recognizing Brandeis Brief on nonjudicial sources of opinion).

[7] The British detainees are fortunate to come from a country which, like the United States, is committed to openness. *Amici* note that we may never know even the identity of those detainees who are nationals of less democratic societies.

[8] Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

tries are being held at Guantánamo.[9] Throughout this time, they have not been charged, have not been allowed to challenge their confinement, have not been permitted to consult with legal counsel of their choice and, most importantly, have not been able to have the legality of their detention reviewed by any impartial tribunal.

The British Detainees[10]

The U.S. military is believed to hold the following ten British nationals, one British resident and one British refugee among the prisoners at Guantánamo.

Shafiq Rasul, Asif Iqbal, and Rhuhel Ahmed

Of the 12 British detainees, two, Shafiq Rasul and Asif Iqbal, are petitioners in Rasul v. Bush, No. 03-343. Together with Rhuhel Ahmed, they share common circumstances: all deny ever being in Afghanistan as combatants. British media sources suggest that they were seized in Pakistan in December 2001 and turned over to U.S. forces at Shebergan, northern Afghanistan, by Northern Alliance fighters seeking rewards from U.S. authorities.[11] The three are friends from Tipton, in the West Midlands in England.

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[9] *See, e.g.*, Mark Bowden, *The Persuaders*, OBSERVER (London), Oct. 19, 2003, *available at* LEXIS, News Library, OBSRVR File; David Rohde, *Threats and Responses: The Detainees*, N. Y. TIMES, Oct. 29, 2002, *available at* LEXIS, News Library, NYT File.

[10] Note that, for simplicity's sake, *amici* refer to the following prisoners as British based on their ties to the United Kingdom and regardless of whether they are technically British citizens or residents.

[11] Tania Branigan & Vikram Dodd, *The Bitterest Betrayal*, GUARDIAN, July 19, 2003, *available at* LEXIS, News Library, GUARDN File. There is no doubt that the United States offered "substantial monetary rewards" for "bad folks" captured in Afghanistan at this time—Secretary of State Donald H. Rumsfeld stated that leaflets announcing the rewards were "dropping like snowflakes . . . in December in Chicago." Donald H. Rumsfeld, News Briefing, (Nov. 19, 2001), *available at* United States Department of Defense, http://www.defenselink.mil/news/.

Asif Iqbal was 20 years old in 2001. Both of Iqbal's parents are of Pakistani heritage—his father moved to England 41 years ago and his mother 25 years ago. His parents traveled to Pakistan in July 2001 to find a bride for him. Iqbal first traveled to Pakistan in September 2001 to join his father in his family's home town near Karachi.[12] In early October, after arranging the marriage, Iqbal told his father that he was traveling to Karachi to meet friends and would return in a week.[13] The last time Iqbal spoke with his family, he telephoned his father from Karachi to inform him of his safe arrival.[14]

Rhuhel Ahmed, who was 20 at the time of his capture, was a friend of Iqbal at Alexandra High School in Tipton.[15] In early October 2001, Ahmed traveled to Pakistan to help with Iqbal's wedding. Three and a half months later, on January 26, 2002, his family learned he was being held in Guantánamo Bay.[16]

Shafiq Rasul was 24 in 2001, and was another of Iqbal and Ahmed's friends from Tipton.[17] Rasul had briefly studied law,[18] and was thinking of going to Pakistan to visit relatives, learn Punjabi, and benefit from a computer course there that was less costly than in England.[19] In mid-September 2001, Rasul went to Lahore, Pakistan.[20] He contacted his family in October 2001 but was not heard from again.

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[12] Rajeev Syal, *Families of Camp X-Ray Detainees Living in Fear of a Racist Backlash*, DAILY TELEGRAPH (London), Feb. 2, 2002, *available at* LEXIS, News Library, TELEGR File.

[13] Branigan & Dodd, *supra*, note 11.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Ian Burrell, *Britons at Camp Delta Make a Sorry Bunch of Warriors*, INDEPENDENT (London), Aug. 3, 2002, *available at* LEXIS, News Library, INDPNT File.

[19] Branigan & Dodd, *supra*, note 11.

[20] Syal, *supra*, note 12.

Jamal Udeen

Jamal Udeen is a 35 year old web designer from Manchester, England, and the son of Jamaican parents.[21] He was away from home only three weeks when U.S. forces came across him in a prison in Kandahar, Afghanistan.[22]

Udeen told reporters in December 2001 that he was passing through Afghanistan on his way to Iran but was detained near the Afghan border by Taliban soldiers who saw his British passport and accused him of being a spy.[23] He was taken to Kandahar Central Prison and tortured by Taliban forces.[24] The British Foreign and Commonwealth Office informed Udeen's sister that he would return to England once his passport was located.[25] His family discovered, through media reports, that he was transported to Guantánamo in February 2002.[26]

Bisher Al-Rawi and Jamil Al-Banna

Al-Rawi and Al-Banna are British residents who were never close to any zone of military operations. They were originally arrested and accused of associating with terrorist groups upon arrival at Banjul Airport, Gambia in November 2002 by the Gambian National Intelligence Agency.[27] Al-Rawi, an Iraqi citizen, had been a U.K. res-

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21 Burrell, *supra*, note 18.

22 Scott Johnson, *Trapped in Prison: Foreigners Jailed by the Taliban Still Waiting for Safe Passage Out of Afghanistan*, NEWSWEEK WEB EXCLUSIVE, Dec. 18, 2001, *at* http://www.msnbc.msn.com/Default.aspx?id=3067352&p1=0 (Jan. 11, 2004); Branigan & Dodd, *supra*, note 11.

23 Branigan & Dodd, *supra*, note 11; *Briton Among Thousands of Taliban Prisoners*, GUARDIAN, May 12, 2002, *available at* LEXIS, News Library, GUARDN File.

24 Branigan & Dodd, *supra*, note 11.

25 *Id.*

26 British Broad. Corp., *At-a-Glance: Guantanamo Bay Britons* (July 23, 2003), http://news.bbc.co.uk/1/hi/uk/3089395.stm.

27 David Rose, *Guantánamo Bay on Trial*, VANITY FAIR, Jan. 2004, at 88, 134.

ident for 19 years,[28] and Al-Banna, a Jordanian refugee resident in England,[29] were among a group of four men, all based in the United Kingdom, who were in Gambia in connection with a peanut-oil processing venture.[30]

Al-Rawi and Al-Banna were held incommunicado in Banjul for approximately two months. They were reportedly questioned by U.S. investigators into whose custody they were delivered without judicial process or extradition proceedings.[31] They were transferred to Bagram Air Base, Afghanistan, in early January 2003—and from there to Guantánamo Bay—despite a habeas corpus petition pending in the Gambian courts.

Moazzem Begg

Moazzem Begg is a language teacher, law student and devout Muslim who lived in Birmingham, England.[32] He moved his family to Afghanistan in 2000 to conduct charity work and help establish an Islamic school.[33] In the fall

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28 *Id.*; Patrick Wintour, *Frantic efforts to bring home Britons held in Cuba as Blair's US trip looms*, GUARDIAN, July 12, 2003, *available at* LEXIS, News Library, GUARDN File. Al-Rawi and his family fled Iraq to escape the regime of Saddam Hussein. The rest of the family took out British nationality, but Al-Rawi retained his Iraqi nationality in order to preserve his claim to property stolen from him upon the long-anticipated fall of Hussein. Clearly he could not depend upon then-President Hussein to assert his interests to the United States between the time of his arrest and the moment of Hussein's fall.

29 *Id.* To obtain refugee status in the United Kingdom, Al-Banna would have had to demonstrate that he had a well-founded fear of persecution in his country of origin, Jordan. *See* Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267. Like Al-Rawi, Al-Banna cannot depend on his government to defend his interests.

30 Rose, *supra*, note 28.

31 *Id.*

32 Paul Harris & Burhan Wazir, *Briton tells of Ordeal in Bush's Torture Jail*, OBSERVER (London), Dec. 29, 2002, *available at* LEXIS, News Library, OBSRVR File.

33 *Id.*

of 2001, as U.S. and U.K. forces entered Afghanistan, Begg fled with his wife and family to Pakistan.[34] He was kidnapped in February 2002 by unknown persons, bundled into a car and smuggled back over the border into Afghanistan, first to Kandahar and then to Bagram.[35] His wife immediately informed relatives in England, who sought assistance from the British government and filed a habeas corpus petition in a Pakistani court.[36] The Pakistani government denied that Begg was in their custody. Begg was held by U.S. forces in Afghanistan for a year after his kidnapping and prior to his transportation to Guantánamo Bay in the spring of 2003.[37]

Tarek Dergoul

Tarek Dergoul is a 25 year old care worker from East London.[38] Unlike the other British prisoners, unconfirmed reports indicate that he may have been involved in hostilities, and was captured in the Tora Bora mountain complex in Afghanistan to which retreating Al-Qaida forces had fled.[39] Dergoul, who was born in Britain and is the son of a retired Moroccan baker, had told his family in May or June 2001 that he was flying to Pakistan to learn Arabic.[40] His whereabouts were a mystery for many months.[41] In May 2002, his family learned that he was held in Guantánamo Bay.[42]

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34 *Id.*

35 *Id.*

36 Audrey Gillan, *Pakistani intelligence and Americans 'abduct' Briton*, GUARDIAN, Mar. 9, 2002, *available at* LEXIS, News Library, GUARDN File.

37 Sandra Laville, *Father Appeals for Son Held in Guantanamo*, DAILY TELEGRAPH (London), Nov. 19, 2003, *available at* LEXIS, News Library, TELGR File.

38 Burrell, *supra*, note 18.

39 *Id.*

40 *Id.*

41 Branigan & Dodd, *supra*, note 11.

42 *Id.*

Tariq Mahmud

Tariq Mahmud is a taxi driver from Birmingham, where his wife and two children continue to live. Mahmud is believed to hold dual British and Pakistani citizenship.[43] Mahmud reportedly left Britain several years ago, moving to Islamabad after spending time in Afghanistan. Thought to be in his 30s, Mahmud is understood to have been arrested near Islamabad, Pakistan as part of an international operation orchestrated by American and Pakistani officials.[44] Sources suggest that Mahmud was kidnapped from Pakistan—picked up by the Americans to gather evidence against another Birmingham man, Moazzam Begg, whose arrest mirrors that of Mahmud's.[45]

Mahmud is included by *amici* because his name has been linked to Guantánamo Bay.[46] Such is the lack of due process in this case that his parents, who live in Birmingham, do not know the whereabouts of their son.[47]

Feroz Abbasi

Feroz Abbasi was born in Uganda and moved to Britain with his parents at the age of eight.[48] The family settled in the London suburb of Croydon, where Abbasi attended high school.[49] He subsequently took a two-year computing course at Nescot College in Epsom, England and was

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43 British Broad. Corp., *Briton 'Arrested Over Terror Links'* (Oct. 30, 2003), *available at* http://news.bbc.co.uk/1/hi/england/west_midlands/3226315.stm.

44 *Id.*

45 *Id.*; Kim Segupta, *Briton Held in Pakistan on Terror Charges*, INDEPENDENT (London), Oct. 30, 2003, *available at* LEXIS, News Library, INDPNT File.

46 Lisa McCarthy, *Release Hopes for Terror Suspects*, BIRMINGHAM EVENING MAIL, Jan. 9, 2004, *available at* LEXIS, News Library, BEMAIL File.

47 Segupta, *supra*, note 45.

48 British Broad. Corp., *From Student to Terror Suspect* (Jan. 21, 2002), http://news.bbc.co.uk/1/hi/uk_politics /1773477.stm.

49 *Id.*

known as a courteous, well-behaved student.[50] Abbasi turned to the study of the Koran and the Muslim faith after he was mugged in Switzerland.[51] He traveled to Afghanistan in December 2000, apparently for religious reasons.

Abbasi was taken into custody by U.S. forces in northern Afghanistan in December 2001.[52] His movements prior to being seized are not known, nor is it known how or where he was surrendered to U.S. forces by the Northern Alliance. Subsequently, he was flown—hooded and shackled—to what was then Camp X-Ray at Guantánamo Bay.[53] Abbasi's mother has stopped receiving correspondence from him,[54] and he was reportedly diagnosed by a U.S. military forensic psychiatrist as suffering from depression.[55] News reports reveal that while in Guantánamo he tried to hang himself with a towel—one of the few possessions allowed in the detention center.[56]

Martin Mubanga

Martin Mubanga is a 29 year old motorcycle courier from North London.[57] He is the son of a former Zambian

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50 *Id.*

51 *Id.*

52 Sean O'Neill, *Feroz Abbasi*, DAILY TELEGRAPH (London), May 5, 2003, *available at* LEXIS, News Library, TELEGR File.

53 *Id.*

54 Julian Borger & Vikram Dodd, *Cuba Britons 'admit war crimes'*, GUARDIAN, Aug. 12, 2003, *available at* LEXIS, News Library, GUARDN File.

55 Vikram Dodd, *Guantanamo Bay Detainee Suffers From Depression*, GUARDIAN, Nov. 18, 2003, *available at* LEXIS, News Library, GUARDN File.

56 *Suicide Bid By Brit Held in Cuba*, DAILY RECORD, July 12, 2003, *available at* LEXIS, News Library, RECORD File. *See also* Rose, *supra*, note 27 at 91.

57 News24, *Sixth Briton Held at Guantanamo*, (Dec. 5, 2002), *at* http://www.news24.com/News24/USAttack/0,,2-1195_1183374,00.html (Jan. 11, 2004).

government official whose family moved to Britain in the 1970s. He was taken into custody in Zambia by local authorities in March 2002. It is thought that he was held by the Zambian authorities for some time before being handed over to U.S. authorities. A Foreign and Commonwealth Office official stated that consular access and information were requested while Mubanga was detained in Zambia, but that request was refused.[58] He was subsequently surrendered to U.S. officials and transported to Guantánamo Bay.[59]

Richard Belmar

Richard Belmar is a former post office worker from north London.[60] He became a Muslim during his teenage years, following the lead of his elder brother. In June 2001 Belmar traveled to Pakistan on a six-week study trip.[61] He called his family twice from Pakistan, telling them that he enjoyed the culture and intended to extend his stay.[62] Belmar's parents received a letter from him in October 2002, saying that he had been arrested in Pakistan eight months prior for over-staying his visa.[63] He was apparently never in Afghanistan. Between October and December of 2002, the British Foreign and Commonwealth Office informed Belmar's parents that Belmar had been taken to Guantánamo Bay where he had been seen by British officials.[64]

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58 *Id.*

59 *Id.*

60 Hala Jaber & Gareth Walsh, *Former Catholic Schoolboy in Al-Qaeda Camp*, TIMES (London), Dec. 29, 2002, *available at* LEXIS, News Library, TIMES File.

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

SUMMARY OF ARGUMENT

The United Kingdom and the United States share an unshakeable commitment to the rule of law. Recourse to an independent and impartial tribunal is required by the rule of law, especially when the justification for detention is contested or uncertain. Independent judicial review is the product of over three centuries of constitutional development in both of our countries, beginning with the struggle between the monarchy and Parliament in Civil War England and embodied in the U.S. Constitution. The international rule of law is anchored in the treaties by which both nations are bound.

Amici respectfully submit that this Court should preserve the judiciary's vital role to insure that executive actions violate neither the Constitution of the United States of America nor the international rule of law and human rights.

Our nations share a unique historical bond, one that was forged in the Parliamentary achievements of the English Civil War and articulated in the Petition of Right and the English Bill of Rights. In its early years, America relied on that legal inheritance, rather than on abstract principles of natural law, in defining the scope of its laws. The Framers created a government of laws rather than of men, manifesting their intent to place the principle of legality above all others. *Amici* urge this Court to assert its constitutional role to ensure that the division of powers so carefully crafted by the Framers is not altered in a way prejudicial to the present, proud commitment to the rule of law.

ARGUMENT

I. THE DETAINEES' CASES PRESENT DISPUTES WHICH CAN ONLY BE FAIRLY DETERMINED BY AN IMPARTIAL AND INDEPENDENT COURT

A. The Circumstances Justifying Detention Are Unproven And Subject To Dispute

There is no mechanism in place or being followed to ensure that the circumstances of these detentions meet even the most basic standards of due process or human rights. The rule of law requires reasonable due process to ascertain the bases asserted in support of prolonged detention as well as the veracity of the facts that support those bases. Indefinite detention without charge represents a violent departure from principles underlying our common legal heritage.[65]

The detention center at Guantánamo was designed, according to the U.S. Administration, to house "the worst of the worst" and "hardest of the hardcore."[66] Yet, other

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[65] Notwithstanding the situation in Guantánamo, the U.S. Administration recognizes the need to act in conformity with the rule of law and with international law: "It is the policy of the United States Government to pursue human rights and the rule of law as a central element of foreign policy. The U.S. approach to countering terrorism does not conflict with or violate this policy." AMNESTY INT'L, *United States of America – The Threat of a Bad Example* 1 (Aug. 2003), *at* http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR511142003ENGLISH/$File/AMR5111403.pdf, *quoting* Letter to Amnesty Int'l Sec'y Gen. Irene Khan, dated 11 July 2003, from Lorne W. Craner, Ass't Sec'y for Democracy, Human Rights and Labor, U.S. Dep't of State (July 11, 2003). Commenting on the United States' efforts in the war on terrorism, the Pentagon General Counsel noted that the administration will not "compromise its commitment to human rights in accordance with the law" in "the conduct of this war against a ruthless and unprincipled foe." Letter from William J. Haynes II, Gen. Counsel, Pentagon, to Sen. Patrick Leahy (June 25, 2003), *at* http://www.hrw.org/press/2003/06/letter-to-leahy.pdf.

[66] Secretary Rumsfeld Roundtable with Radio Media (Jan. 15, 2002), *available at* United States Department of Defense, http://www.

statements by the administration suggest that Guantánamo holds no high ranking terrorist of any significance.[67]

On the face of the facts as they are known, there is nothing to indicate any basis for detaining any of the British detainees. Some of the detainees appear to have been innocently caught up in the Afghan conflict.[68] In addition, many were seized in foreign countries, some far from the Afghan hostilities.[69] *Amici* know nothing more about the various detainees than is summarized above because U.S. authorities assert the power to detain them with no outside scrutiny whatsoever, whether by the 42 States from which they hale, or the U.S. courts.[70] These circum-

defense link.mil/transcripts/2002/t01152002_t0115sdr.html (last visited Jan. 9, 2004). White House Press Report: Argentina, Philippines, Guantanamo, South Asia (Jan. 16, 2002), *available at* United States Department of State http://usinfo.state.gov/regional/nea/sasia/afghan/text/0116wthsrpt.htm (last visited Jan. 9, 2004).

[67] *See* Bob Drogin, *No Leaders of Al Qaeda Found at Guantanamo*, L.A. TIMES, Aug. 18, 2002 *available at* LEXIS, News Library, LAT File (quoting anonymous U.S. intelligence official's statement that inmates at Guantanamo "are mostly 'low and middle-level' fighters . . . not 'the big-time guys'").

[68] For example, Jamel Udeen was attempting to travel across Afghanistan in September 2001 when he was arrested and tortured by the Taliban as a British spy, then abandoned in a Kandahar jail where U.S. forces found him some months later.

[69] Richard Belmar, Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed, Bisher Al-Rawi, Jamily Al-Banna, Moazzem Begg, Tariq Mahmud, and Martin Mubanga.

[70] Justice Anthony M. Kennedy has stated that "[a]s a profession, and as a people, we should know what happens after the prisoner is taken away" in recommending that prison reform was a proper concern for the entire legal profession, and not only for its criminal law practitioners. Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html). *Amici* believe that the situation in Guantánamo is equally deserving of our interest because affirming the court below would deny this Court's constitutional role.

stances require an objective judicial determination to safeguard minimal levels of due process and human rights.

B. The Legal Justifications For Detention Are Ambiguous And Also Subject To Dispute

Similarly, the reported facts raise serious legal issues deserving judicial scrutiny. If, as reported, several U.K. nationals detained in Guantánamo were seized in foreign countries in return for favors by the United States or in violation of due process, they are potentially held in Guantánamo in violation of local and international law. An initial breach of international law by one state in relation to a foreign national does not relieve a second state of its international obligations in respect of those same nationals. Furthermore, no state's domestic legislation can excuse that state or another from strict compliance with its own international obligations.[71]

Martin Mubanga, a U.K. citizen and the son of a former Zambian government official, was detained by the Zambian government and summarily surrendered to U.S. authorities before the circumstances of his original detention were established or tested. Al-Banna and Al-Rawi were both detained by the Gambian government and turned over to the U.S., despite a habeas corpus petition pending on their behalf. Tariq Mahmud and Moazzem Begg were apparently kidnapped in Pakistan in violation of Pakistan's domestic laws and Pakistan's international legal obligations to the U.K. The circumstances of Shafiq Rasul and Asif Iqbal are set forth in other briefs to this Court, but it merits noting that they and detainee Rhuhel Ahmed were apparently first seized by Northern Alliance fighters eager to earn favors from U.S. authorities.[72]

[71] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 451-52 (5th ed. 1998); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 320 (1987).

[72] Rose, *supra*, note 27 at 134.

The court below noted that the situation of prisoners of war detained by armed forces in the middle of hostilities limits the rights available to those detained.[73] However, even if some of the British prisoners were detained in the theatre of military operations, and beyond the protection of *constitutional* due process,[74] the grounds for denying them due process must have long ago expired two years later and six thousand miles away in an area under no military threat and under the complete dominion of the U.S. government.[75]

II. INDEFINITE EXECUTIVE DETENTION WITHOUT JUDICIAL REVIEW IS INIMICAL TO THE UNITED STATES' COMMITMENT TO THE RULE OF LAW AND ITS INTERNATIONAL OBLIGATIONS

A. The United Kingdom And The United States Share A Common History And Tradition Of Judicial Review Of Executive Power

In establishing a tripartite separation of powers and a truly independent judiciary, the Framers were aware of,

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73 *Al Odah v. United States*, 321 F.3d 1134, 1139-40 (D.C. Cir. 2003).

74 Even those captured in the course of military operations are entitled to the protections set out in the Geneva Conventions. *See* 1949 Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3365; 1949 Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 3.

75 *See Ex Parte Milligan*, 71 U.S. 2 (1866) (holding that "[a]s necessity creates the rule, so it limits its duration . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."). Ironically, U.S. courts have jurisdiction to adjudicate claims of defendants arrested abroad and forcibly brought to the United States for purposes of prosecution. *See, e.g., United States v. Rezaq*, 134 F.3d 1121, 1132 (D.C. Cir. 1998); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (examining "norms of customary international law" and upholding extraterritorial jurisdiction under Federal Hostage Taking and Air Piracy statutes).

and could look to, Parliament's prior achievements to subject the will of the Sovereign to the rule of law.[76] In 1627, Charles I, who had been collecting forced loans from his subjects, imprisoned five knights in the Tower of London who refused to comply with the royal "request." They sought release through writs of habeas corpus. When the King returned the writ, he did not state that the knights had refused to loan him funds, but instead stated that they were each held "by special command of his majesty (*per speciale mandatum regis*)."[77] The court affirmed the King's absolute prerogative and denied the knights' petitions.

Parliament responded by forcing the King to sign the Petition of Right of 1628, which referenced the Magna Carta and asserted that no person should be subject to arbitrary arrest or imprisonment.[78] The King ultimately accepted the Petition and it thereby became part of the law inherited by the American colonies.

Almost 40 years later, Parliament again acted to secure the freedom of the individual from arbitrary detention. During the English Civil War, the British created their own version of Guantánamo Bay and dispatched undesirable prisoners to garrisons off the mainland, beyond the reach of habeas corpus relief. In 1667, Edward Hyde, First Earl of Clarendon, was impeached, in part for his role in procuring the illegal imprisonment of political offenders in remote and unknown places.[79] In 1679, Par-

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76 "For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" THE FEDERALIST NO. 78 (Alexander Hamilton) (quoting CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS). *See also Marbury v. Madison* for the proposition that constitutional limitations on government authority can be safeguarded only by the judiciary. 5 U.S. 137 (1803).

77 BERNARD SCHWARTZ, THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND 133 (1967).

78 PETITION OF RIGHT, 1628, art. III.

79 THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 594 (10th ed. 1946).

liament passed the Habeas Corpus Act foreclosing that potential for abuse.

In April 1689, almost a century before the Framers gathered in Philadelphia, William and Mary of Orange were crowned King and Queen after swearing obedience to the laws of Parliament and reading the Bill of Rights as part of their oaths.[80] As a precursor to the American Bill of Rights, the English Bill of Rights established strict limits on the Sovereign's legal prerogatives, including a prohibition against arbitrary suspension of Parliament's laws.[81] It also established the fundamental constitutional principle of Parliamentary supremacy and made the executive fully accountable to Parliament and the courts, often referred to as the rule of law. Among other things, under the rule of law the existence or non-existence of a power or duty is a matter of law, and it is for the courts to determine whether a particular power exists, define its ambit, and provide an effective remedy for its unlawful exercise.[82] The English Bill of Rights also added other rights: the King was forbidden from establishing his own courts or acting as a judge, and the courts were forbidden from imposing excessive bail or fines, or cruel and unusual punishments.

The Framers built on this common tradition and drafted a Constitution that institutionalized the separation of powers and subjected the Legislature and the Executive to the rule of law.[83] This Court has repeatedly acknowl-

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[80] ENGLISH BILL OF RIGHTS, 1689.

[81] ENGLISH BILL OF RIGHTS, 1689, art. I.

[82] 8(2) HALSBURY'S LAWS OF ENGLAND (4th ed., 1996), Constitutional Law and Human Rights ¶6.

[83] Even before the U.S. declared its independence, Maryland's General Assembly passed an Act for the Liberties of Peoples (1639). In 1641, the Massachusetts Body of Liberties was adopted and arguably became the first "American attempt" to enumerate "fundamental rights . . . in a written instrument enacted by the people's representatives." BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 71 (1971).

edged that the English Bill of Rights inspired many of the central provisions of the Constitution.[84] These historical limits on arbitrary executive power in England, the development of American constitutional law, and the corresponding growth of individual liberty on both sides of the Atlantic, have, since those early days, inspired impressive contributions by the U.S. to the development of international human rights and freedoms.

B. Both Countries Have Played Seminal Roles In The Development Of The International Rule Of Law And Human Rights

In the wake of the First World War, the United States played a prominent role in drafting the Statute and Protocol of the Permanent Court of International Justice ("PCIJ"), foreshadowing a pattern of international participation in the creation and formulation of international law.[85] The governments of the United States and of the

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[84] "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history." *Hurtado v. California*, 110 U.S. 516, 530 (1884). *See also Duncan v. Louisiana*, 391 U.S. 145, 151-52 (1968) (noting that a jury trial, expressed in the English Bill of Rights to protect against arbitrary rule, came to America with English colonists); *United States v. Johnson*, 383 U.S. 169, 178 (1966) ("Since the Glorious Revolution in Britain . . . the privilege [of the Speech and Debate Clause] has been recognized as an important protection of the independence and integrity of the legislature"); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 669 (1965) (Black, J., dissenting) ("It was in Magna Carta, the English Bill of Rights, and other such charters of liberty, that there originally was expressed in the English-speaking world a deep desire of people to be able to settle differences according to standard, well-known procedures . . ."); *In re Groban*, 352 U.S. 330, 351 n.32 (1957) (Black, Warren, Douglas & Brennan, JJ., dissenting) (surveying British law to clarify the right to counsel during an investigatory procedure).

[85] Notwithstanding the fact that the Senate failed to endorse the PCIJ'S terms, American participation in the formulation of international law was not hampered: a Judge of U.S. citizenship served on the bench of the PCIJ throughout its lifetime. Rosalyn Higgins, *The*

United Kingdom also contributed significantly to the drafting of the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR").[86] The governments of both nations signed and ratified the ICCPR, the Convention Against Torture,[87] and the Geneva Conventions, as well as regional international human rights treaties.[88] These international treaties not only reflect many of the constitutional laws of the United States and the United Kingdom, but also general international law and the values of our shared political and legal tradition.[89] The human

ICJ, the ECJ, and the Integrity of International Law, INT'L & COMP. L.Q. 52.1(1) (2003).

[86] The United States signed the ICCPR in 1977, ratified it in 1992, and made reservations that Articles 1 through 27 were not self-executing. ICCPR Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. Notwithstanding those reservations, the United States, which includes the judiciary, has an obligation under the ICCPR itself and customary international law, as reflected in Article 18 of the Vienna Convention on the Law of Treaties ("VCLT"), to "refrain from acts which would defeat the object and purpose of a treaty." VCLT, 8 I.L.M. 679 (1969); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 314 (Tentative Draft No. 1, 1980); Michael J. Glennon, *The Senate Role In Treaty Ratification*, 77 AM. J. INT'L L. 257 (1983). *See also Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1161-62 (C.D. Cal. 2002) (referring to an un-ratified treaty as evidence of the content of customary international law).

[87] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984).

[88] *See, e.g.*, Inter-American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 ("American Convention"); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ("ECHR").

[89] These values include the obligation undertaken by States to ensure that: (i) no one is subject to arbitrary arrest, detention or exile. *See, e.g.*, UDHR, Dec. 10, 1948, art. 9, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810; American Declaration of the Rights and Duties of Man, May 2, 1948, art. XXV, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 (1992) ("American Declaration"); (ii) anyone who is

rights and fundamental freedoms they protect are also inherent in our common humanity and our democratic systems of government under law. The judiciary must protect from an abuse of executive power even those interests which arise under international law—as noted by the Framers of the Constitution.[90]

Should the judiciary fail to fulfill its responsibility to determine the legality of the British prisoners' detention, there would exist a prison for indefinite detention functioning in total secret, under the unchallenged exclusive control of the executive branch of the U.S. government. That result offends the United States' domestic and international commitment to basic due process and human rights.

detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. *See, e.g.*, American Convention, art. 7; ICCPR, art. 14; (iii) anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. *See, e.g.*, American Convention, art. 7; ICCPR, art. 9; (iv) all persons are equal before the law and entitled without any discrimination to the equal protection of the law. *See, e.g.*, UDHR, art. 7; ICCPR, art. 26; and (v) every accused person is presumed to be innocent until proved guilty. *See, e.g.*, UDHR, art. 11; American Declaration, art. XXVI; ICCPR, art. 14.

[90] Alexander Hamilton commented on the proper scope of judicial review and the importance of international law:

> As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility. . . . But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the lex loci, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty or the general law of nations.

THE FEDERALIST No. 80 (Alexander Hamilton).

C. Past Deviations From The Rule Of Law And International Obligations In Times Of National Crises Are Embarrassing Episodes In Our Respective Histories

Courts have a duty to vindicate the rule of law when it is circumvented or abused by legislative or executive fiat. History harshly judges attempts to detain individuals beyond the reach of the rule of law even in times of crisis. Japanese-American internment during the Second World War has become the paradigm for the pitfalls of judicial deference to arbitrary executive detention. The U.K. had its regrettable equivalent to the military order used to imprison Fred Korematsu. Under the auspices of Section 18B of the Wartime Defence Regulation, approximately 27,000 persons were detained between 1939 and 1945 in the U.K without charge, trial, or set term.[91] This abuse of executive power allowed arrest and detention on the Home Secretary's "reasonable belief" that an individual posed a threat to the nation—judicial deference was presumed. The most conspicuous case thereunder, *Liversidge v. Anderson*, also provides the most vigorous and insightful dissent. 1942 A.C. 206 (1941). Expressing his deep concern to safeguard the role of the judiciary in the scheme of the government, Lord Atkin stated, "in this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace." *Id.* at 244. Lord Atkin's comments, largely disfavored by his fellow Law Lords, are now universally viewed as an accurate reflection of the rule of law even in times of war.[92]

[91] Numbers cannot be confirmed because authorities refuse access to many papers. ALFRED W. B. SIMPSON, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN 422 (1992).

[92] *Amici* do not opine on how this Court should balance the exigencies of "war or public danger" with the interest of due process when it comes to ruling on what process is due under the circumstances. Nevertheless, as one prominent U.S. jurist has commented, the rule of law is never *completely* silent. *See* Chief Justice William H. Rehnquist, Remarks at 100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association (May 3, 2000) (transcript *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_05-03-00.html). This suggests that the judiciary must at least take jurisdiction in this case.

The U.K.'s recent experience with terrorism is equally instructive. In answering charges that it violated the human rights of Irish citizens held in the U.K. because of suspected involvement in terrorism, the U.K. government claimed that it was compelled to take severe measures. However, the powers of detention exercised over suspected Irish terrorists were eventually criticized by the European Court of Human Rights as disproportionate violations of human rights.[93]

Such examples stand out "as a caution that in times of distress the shield of military necessity and national security must not be used to protect government institutions from close scrutiny and accountability."[94] Moreover, these examples from both the U.S. and U.K. are no more shocking than the situation in Guantánamo, where detainees have been precluded from even being informed of the grounds for their detention or having their rights brought before any court of law.[95]

[93] *Brannigan & McBride v. United Kingdom*, 258 Euro. Ct. H.R. (ser. A) (1993); *Brogan, et al. v. United Kingdom*, 11 Eur. H.R. Rep. 117 (1989). The Good Friday Agreement of 1998 sought to redress those violations by providing for a specialized tribunal to deal with human rights reforms, and for changes in policing and the courts. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, 37 I.L.M. 751 (1998).

[94] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

[95] The U.K. has its own anti-terrorism measures: the Anti-terrorism, Crime and Security Act 2001 (ATCSA). The ATCSA was enacted on December 14, 2001 and provides for detention of only non-U.K. nationals. As harsh as the law and the executive decisions made thereunder may be, neither evade judicial scrutiny. ATCSA provides for judicial review of executive determinations that a person is a suspected terrorist and provides detainees with their counsel of choice.

It cannot be sufficient for the Respondent to argue that the actions of U.S. authorities in Guantánamo are non-reviewable by any U.S. court because these actions took place outside the area of technical U.S. political sovereignty.[96] The detainees have been brought under duress by those same authorities and are within their exclusive control. In so arguing, the Respondent is in fact asserting that the checks and balances of the Constitution, so carefully constructed by the Framers and preserved for more than two centuries, can be set aside and denied to prisoners solely on the basis of a Presidential determination which is not subject to judicial review. Unchecked power always begets the greater exercise, and probable abuse, of that power. Courts have a duty to ensure that today's response to military crises cannot subsequently be used to justify an attack on human rights and due process.[97]

[96] The United States' total and absolute control over those detained as enemy combatants at Guantánamo renders it responsible pursuant to its obligations at international law. The concept of jurisdiction under the ICCPR, for example, is essentially territorial, but where, exceptionally, a State exercises effective control of foreign territory, that territory falls within Article 2(1) of the ICCPR and has extraterritorial application. The same is true under Article 1 of the ECHR. *See, e.g., Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513 (1996); *Loizidou v. Turkey* (Preliminary Objections), 20 Eur. H.R. Rep. 99 (1995).

[97] *Amici* recall a distinguished foreigner whose comments on the potential for executive abuse at the Republic's infancy ring true today:

> I think that liberty is endangered when this power [of the majority] is checked by no obstacles which may retard its course, and force it to moderate its own vehemence. Unlimited power is in itself a bad and dangerous thing; human beings are not competent to exercise it with discretion; and God alone can be omnipotent, because his wisdom and his justice are always equal to his power. But no power upon earth is so worthy of honor for itself, or of reverential obedience to the rights which it represents, that I would consent to admit its uncontrolled and all-predominant authority.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 306 (Henry Reeve trans., Schocken 1961) (1835).

D. United States Courts Consistently Seek To Act In Harmony With International Law

This Court has long recognized that it is appropriate for U.S. law to be consistent with international law and custom.[98] In fact, members of this Court have recognized the importance of international human rights law to constitutional adjudication as a yardstick of the principles generally shared by the United States with other civilized nations.[99] Likewise, the senior constitutional courts in the

[98] Subject to the Constitution, customary international law and treaties are the law of the United States. U.S. CONST. art. VI, § 2; *Hurd v. Hodge*, 334 U.S. 24, 35 (1948) (striking down racially restrictive legislation as violative of public policy manifested in, *inter alia*, treaties); *Oyama v. California*, 332 U.S. 633, 649-50, 673 (1948) (relying on provisions of the United Nations Charter as a source of legal obligations and finding Alien Land Law invalid as inconsistent with the "high ideals" therein) (Black, Douglas, Murphy & Rutledge, JJ., concurring); *The Paquete Habana*, 175 U.S. 677 (1900); *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804).

[99] *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). Members of this Court have remarked on the value of comparative perspective in judicial interpretation. *See, e.g.*, Justice Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35 (1996). Justice Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1060 (2000) ("the nations we visited, like our own, attach great importance to the rule of law.... we can learn from their structural efforts.... I am certain that comparative constitutional study of substance and of structure is part of that task."). Justice Ruth Bader Ginsberg has made a similar observation:

> A prominent jurist put it this way 14 years ago: 'For nearly a century and a half, courts in the United States exercising the power of judicial review [for constitutionality] had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts

United Kingdom and other commonwealth countries refer to and use provisions of the generally recognized international human rights instruments—both incorporated and unincorporated—to interpret and apply domestic common law,[100] legislation,[101] and legal doctrines.[102]

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begin looking to the decisions of other constitutional courts to aid in their own deliberative process.'

Justice Ruth Bader Ginsburg, Remarks for the American Constitutional Society (Aug. 2, 2003), *quoting* William H. Rehnquist, Constitutional Courts-Comparative Remarks (1989), *reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

100 *Derbyshire County Council v. Times Newspapers*, [1992] Q.B. 770, 812 (Eng.) (noting that, although Article 10 of the European Convention on Human Rights is not incorporated into English law, "it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law"); *Attorney-General v. Guardian Newspapers* (No. 2), [1990] 1 A.C. 109, 134 (Eng.) (observing that the common law duty of confidence comported with Article 10 of the European Convention on Human Rights).

101 *See Waddington v. Miah*, [1974] 1 W.L.R. 692, 694 (Eng.) (observing that British immigration laws comport with Article 11(2) of the UDHR and the ECHR). *See also R. v. Sec'y State Home Dep't, ex parte Simms*, [2000] 2 A.C. 115, 130, 131-32 (Eng. H.L.) (noting that even when public powers are conferred by clear and unambiguous words, there is a presumption that the legislation conforms with the human rights treaties by which the U.K. is bound; legislature and executive are presumed to further, rather than to frustrate, international treaty obligations); *R. v. Sec'y State, ex parte Brind*, [1991] 1 A.C. 696 (Eng. H.L.) ("It is already well settled that, in construing any provisions in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the [European Convention for the Protection of Human Rights], the courts will presume that Parliament intended to legislate in conformity with the convention"); *Garland v. British Rail*, [1983] 2 A.C. 751 (Eng. H.L.) (finding that nothing short of an "express positive statement" in an Act of Parliament justified a court to construe a provision "in a manner inconsistent with a Community treaty obligation of the United Kingdom").

102 Australian, Canadian, English, and New Zealand courts look to international standards when applying the "legitimate expectations" principle to administrative decisions regarding compliance with unincorporated conventions. *See, e.g., Minister Immigration & Ethnic Affairs v. Teoh*, 128 A.L.R. 353 (Austl. 1995); *Baker v. Minister of*

While courts must take into account the exigencies of war and national emergency, a country's courts must never abdicate their constitutional role. It was an American Supreme Court Justice who reminded the British of this essential principle in the aftermath of the Second World War. Sir Winston Churchill argued that Nazi leaders should be shot upon their capture,[103] an outcome averted largely by the United States lobbying for the creation of the International Military Tribunal at Nürnberg. Justice Jackson, then Chief of Counsel for the United States, noted in his opening remarks to the court: "That four great nations flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason."[104]

The United States and its allies then faced a great enemy and had suffered appalling losses. In discussing what to do with war criminals, the United States' official position was premised on the rule of law:

> we could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American

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Citizenship, [1999] 2 S.C.R. 817 (Can.); *R. v. Sec'y State, ex parte Ahmed & Others*, [1999] Imm. A.R. 22 (Eng. C.A.); *R. v. State Home Dep't, ex parte Behluli*, [1998] IAR 407 (Eng. C.A.) (Dublin Convention); *Tavita v. Minister Immigration*, 2 N.Z.L.R. 257 (N. Z. 1994).

103 7 MARTIN GILBERT, WINSTON S. CHURCHILL: ROAD TO VICTORY 1941-1945, 1201-02 (1986). *See also*, Chief Justice William H. Rehnquist, Dedication of the Robert H. Jackson Center (May 16, 2003) ("the Nuremberg Trials were surely superior to the summary court martial proceedings favored by some members of the administration and the summary executions initially favored by the British.").

104 Robert H. Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945).

> conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.[105]

The Nürnberg trials were established between the victorious Allies and thus did not afford domestic constitutional protection. The United States, however, clearly understood that at a minimum, a trial and a public record were required—if not by the letter of the law, then by principles upon which the Republic was created.

CONCLUSION

This case provides the Court with an opportunity to vindicate the rule of law under the Constitution and preserve the role of the courts in ensuring that the exercise of executive power over the detainees in Guantánamo will not be above the law. Petitioners' writs should be granted.

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105 Report of Robert H. Jackson To the President, June 7, 1945, DEP'T ST. BULL., June 10, 1945, at 1071, 1073. The report was released to the press by the White House with Presidential approval and was accepted by other governments as the official statement of the United States. It was subsequently placed before all of the delegations at the London Conference.

Respectfully submitted,

EDWIN S. MATTHEWS, JR.
Counsel of Record
EDWARD H. TILLINGHAST, III
DAMION K. L. STODOLA
ANDREA G. LAULETTA*
RACHEL WRIGHTSON*
COUDERT BROTHERS LLP
1114 Avenue of the Americas
New York, New York 10036
212-626-4400

PETER CARTER QC
18 Red Lion Court
London EC4A 3EB
44-20-7520-6000

JEREMY CARVER, CBE
CLIFFORD CHANCE LLP
10 Upper Bank Street
London E14 5JJ
44-20-7006-1000

LORD LESTER OF
HERNE HILL QC
DAVID PANNICK QC
BLACKSTONE CHAMBERS
Blackstone House
Temple
London EC4Z 9BW
44-20-7583-1770

* *Admission pending in New York*

Attorneys of 175 Members of both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

(20) (20)

Nos. 03-334 and 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL ET AL.,

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v.

GEORGE W. BUSH ET AL.,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH ET AL.,

Petitioners,

v.

UNITED STATES ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE COMMONWEALTH LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

SIR SYDNEY KENTRIDGE, Q.C.
Brick Court Chambers
7-8 Essex Street
London WC2R 3LD
44 207 379 3550

STEPHEN J. POLLAK*
JOHN TOWNSEND RICH
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

COLIN NICHOLLS, Q.C.
3 Raymond Buildings
London WC1R 5BH
44 207 400 6400

TIMOTHY OTTY, BARRISTER
20 Essex Street
London WC2R 3AL
44 207 842 1200

Attorneys for the Commonwealth Lawyers Association

Counsel of Record

January 14, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF THE *AMICUS CURIAE*[1]

The *amicus*, the Commonwealth Lawyers Association ("the CLA") is a body dedicated to the rule of law throughout the Commonwealth.[2] All Law Societies and Bar Associations of the 53 countries comprising the Commonwealth are institutional members of the CLA.

Three signatories to this brief are practicing members of the English Bar. Colin Nicholls, Q.C., is the President of the CLA, and he has signed the brief with the full authority of the Council of the CLA.

The Petitioners who are seeking to appeal the judgment of the United States Court of Appeals for the District of Columbia Circuit include two citizens of the United Kingdom and two citizens of Australia, member states of the Commonwealth.[3] Other Petitioners are nationals of Kuwait, a state which like the United Kingdom and Australia is friendly to the United States.[4]

This brief is submitted in support of the Petitioners, but the CLA wishes to make it clear at the outset that it does not presume to examine or comment on the judgment of the Court of Appeals in this case or the judgment of this Court in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950). The main purpose of this brief is to explain the basis on which the courts of the United Kingdom exercise jurisdiction in habeas corpus.

We hope this may assist this Court for the following reasons:

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[1]No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and its legal counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk.

[2]The Commonwealth is a voluntary association of 53 independent sovereign States. Its 1.7 billion people account for 30 per cent of the world's population.

[3]Pet., No. 03-334, at 2.

[4]Pet., No. 03-343, at 1.

a) the writ of habeas corpus has its origin in England;
b) in *Johnson* v. *Eisentrager* the Supreme Court referred to the English origins of habeas corpus and the harmony between the relevant laws of the two jurisdictions;[5]
c) because of Britain's history as an imperial power, issues of territorial jurisdiction in habeas corpus have not infrequently arisen in the High Court in England in relation to territories outside the United Kingdom, including territories over which the United Kingdom did not assert sovereignty but, over which, through its own executive officers, it exercised power and control.

SUMMARY OF THE ARGUMENT

In the English courts neither the nationality of the detained person, nor the existence of sovereignty in the detaining State over the territory in which the person is detained, determine the availability of the writ of habeas corpus. It has, furthermore, been clear that this has been the case under English law since at least 1772.[6] The determining factors are and have

[5]339 U.S. at 779. See also *Fay* v. *Noia*, 372 U.S. 391, 399–400 (1963), where the Court, per Brennan J., spoke of the "extraordinary prestige of the Great Writ" in Anglo-American jurisprudence and its "Anglo-American" development and also stated (at 401): "It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today."

[6]As we explain below, *Sommersett's Case*, 20 State Trials 1 (1772), established that habeas corpus is available to British nationals and others alike, and the Habeas Corpus Act, 1679, and *Rex* v. *Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B. 1759), removed any doubt that the Court's jurisdiction to issue the writ extended to detentions overseas and to any place "under the subjection of the Crown of England." Subjection in this context implied no more than actual control and power, not technical sovereignty: "'Subjection' is fully appropriate to the powers exercised or exercisable by this country [*i.e.*, the United Kingdom] irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the

been, rather, whether the respondent to the writ possesses the actual power of detention or release, whether that respondent is subject to the jurisdiction of the court, and, in the case of distant territories, whether there is a local court with power to grant the remedy.

Accordingly, subject to the assumptions that—

a) the Petitioners are not enemy aliens;[7]
b) they are not admitted or clearly shown to be prisoners of war in terms of the Geneva Convention (III) Relative to the Treatment of Prisoners of War;[8]
c) there is no court in Guantanamo Bay with power to grant and enforce the writ of habeas corpus;

if it were the United Kingdom and not the United States which controlled Guantanamo Bay Naval Base and held the Petitioners in detention on the same basis and with the same powers as does the United States, English courts having jurisdiction over the Respondents would assume jurisdiction to issue writs of *habeas corpus*, whatever the nationality of the Petitioners. We believe that the same position would also apply in the courts of the Commonwealth, were any other Commonwealth State to be in control of the Guantanamo Bay Naval Base.

We emphasise that this is not to say that an English or Commonwealth court would necessarily set the Petitioners at liberty. But it would, on the return to the writ, examine their

Crown in the place concerned." *Ex parte Mwenya*, [1960] 1 Q.B. 241, 310 C.A.), per Lord Justice Sellers, discussed *infra*.

[7]As we shall explain in Part V below, as a matter of English law, the question whether a detained person is properly to be categorized as an enemy alien is a matter within the jurisdiction of the Court and to be determined by the Court and not by the Executive.

[8]This Convention provides its own remedies for persons held as prisoners of war, but who dispute that classification. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Pet., No. 03-334, at 69a, 70a).

status and the circumstances of their detention, and determine whether their detention was justified.

ARGUMENT

I. The origins and history of the writ of habeas corpus illustrate the importance of the writ and the breadth of protection it affords.

The origins of the writ of habeas corpus in England and the Commonwealth may be found in *Magna Carta*. Article 1 of *Magna Carta* states that all the freedoms set out therein were "given to all the free-men of our realm, for us and our Heirs for ever," and Article 29 provides that "no Freeman shall be taken, or imprisoned, or be dispossessed of his Freehold, or Liberties, or free Customs, or be outlawed or exiled, * * * but by lawful Judgment of his Peers, or by the Law of the Land."[9] A Divisional Court of the Queen's Bench has recently endorsed the following statement as accurately reflecting the writ's present-day significance in English law:

> "[*Magna Carta*] becomes and rightly becomes a sacred text, the nearest approach to an irrepealable 'fundamental statute' that England has ever had. * * * For in brief it means this, that the king is and shall be below the law."[10]

It appears that it was in the sixteenth century that the writ of habeas corpus first began to be used as a means of testing the validity of executive committals.[11]

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[9] *Magna Carta* arts. 1 & 29, 1 Stat. at Large (Runnington rev. to Ruffhead ed., London, Charles Eyre *et al.* 1786).

[10] 1 Frederick Pollock & Frederic W. Maitland, The History of English Law 173 (2d ed. 1923), cited and quoted with approval by Lord Justice Laws in *Regina (Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2001] Q.B. 1067, 1095 (Q.B.D. Admin. Ct.).

[11] R.J. Sharpe says in the leading textbook on the subject, The Law of Habeas Corpus (2d ed. 1989), at 7: "By the time of Elizabeth [I], it was becoming clear that the claim to a power to commit for reasons of state could be tested on habeas corpus. There are cases as early as 1567 in which habeas corpus was used by persons detained by order of the Privy Council to obtain their release on bail."

In 1640 the English Parliament made its first express attempt to curtail the power of executive detention. Section VIII of the Habeas Corpus Act of 1640, 16 Car. 1, c. 10, provided that "any Person" imprisoned by order of the King or his Council should have habeas corpus and be brought before the court without delay with the cause of imprisonment shown. The Act was passed against the background of the first case of major constitutional importance to address the question of habeas corpus, *Darnel's Case*, 3 State Trials 1 (K.B. 1627).[12] Although now repealed, the Act's wording is notable in that it attributes no significance to either the location of the detained person or his nationality. The right arose purely by virtue of the detention by the King or his Council.

In 1679 a second Habeas Corpus Act, 31 Car. 2, c. 2, was passed. The background to the Act lay in practices which had grown up designed to circumvent the protection afforded by the writ. Prisoners were moved from gaol to gaol so that it was impossible to serve the proper gaoler with the writ and some prisoners were removed overseas, giving rise to practical difficulties in terms of communication (between the detained person and those acting on his behalf), service (on the relevant gaoler), and enforcement of the writ (by produc-

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[12] In *Darnel's Case*, the King, Charles I, had imprisoned five Knights as a result of their refusal to contribute to the repayment of a forced loan he had taken out. The Knights sought their freedom by issue of writs of habeas corpus and, in response, the King simply asserted (at 33) that they had been detained "*per speciale mandatum domini regis*." The issue in the case was whether the Court was required to assume that there was substantive legal justification for the imprisonment or whether the failure to disclose specific grounds entitled the prisoners to be bailed pending trial. The Court ruled in favour of the King and refused to bail the Knights. The Habeas Corpus Act of 1640 in effect reversed that decision.

tion of the detained person) if the writ was issued.[13] The terms of the Act were designed to counter these stratagems. They also made it clear that the territorial scope of the protection afforded by habeas corpus was intended to be broad and removed any doubt that the Court's jurisdiction to issue the writ extended to detentions overseas. The preamble to the Act described it as "An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas." Section XI expressly declared that the writ would run overseas by declaring that it "may be directed and run" to Jersey and Guernsey.[14] Section XII made it an offence to remove detained persons to "Scotland,[15] Ireland, Jersey, Guern-

[13]Twelve years earlier in 1667 one of the charges made against Edward Hyde, the First Earl of Clarendon and Lord Chancellor, on his impeachment was that he had attempted to preclude access to the writ of habeas corpus by sending persons "to be imprisoned against law in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law." See *Proceedings in Parliament against Edward Earl of Clarendon, Lord High Chancellor of England, for High Treason, and other High Crimes and Misdemeanours: 15 and 19 Charles II. A.D. 1663-1667*, 6 State Trials 291, 330, 396 (1668).

[14]This was consistent with the fact that the Courts had already recognized, or would very shortly recognize, that the writ could run to the Channel Islands, Ireland, and Calais: *The King* v. *Salmon*, 2 Keble 450, 84 Eng. Rep. 282 (K.B. 1669) (re the Channel Islands); *Anonymous*, 1 Ventris 357, 86 Eng. Rep. 230 (K.B. 1681) (re Ireland, Calais, and the Channel Islands).

[15]The English High Court had never had jurisdiction to send the writ to Scotland because of the formal distinction between the English and Scottish Crowns and the writ's status as a prerogative remedy of the English Crown. Holdsworth described the practices which the Act sought to counter as including "in the last resort, [removal of the prisoner] out of the jurisdiction of the court." 9 W.S. Holdsworth, A History of English Law 116 (3d ed. 1944). This may be taken to be a reference to removals to Scotland and other such places and not as suggesting any wider limitation to the jurisdiction of the court whenever a prisoner is confined outside of England. Thus Holdsworth states (at 124) that "[i]t was a well-established principle that, though the writ could not issue into the foreign dominions of a prince who succeeded to the throne of England, and therefore not into

sey, Tangier, or into Parts, Garrisons, Islands or Places beyond the Seas, which are or at any time hereafter shall be *within or without* the Dominions of his Majesty." (Emphasis added.) Section XII also went on to state that any such imprisonments would be illegal and would give rise to an action for false imprisonment.

The Habeas Corpus Act of 1816, 56 Geo. 3, c. 100, was the next significant development. It empowered the court to inquire into the truth of facts averred in the return to the writ and, in cases of doubt as to their accuracy, to grant the detained person bail,[16] and it specified that "non-obedience" to the writ of habeas corpus was a contempt of court.[17]

Scotland or Hanover, it could issue into any other part of the king's dominions." Holdsworth summarises (at 118) the effect of the 1679 Act as having made "the writ of *Habeas Corpus ad subjiciendum* the most effective weapon yet devised for the protection of the liberty of the subject" and describes the success of the Act in effecting its object as being "illustrated by the desire of James II. to get it repealed." He notes (at 118 n.10) that in October 1685 Barillon wrote to Louis XIV that James "designed to obtain from the Parliament a repeal of the Test and Habeas Corpus Acts, the first of which is the destruction of the Catholic Religion, and the other of the royal authority."

[16]Sections 3–4.

[17]Section 2. Another Act passed in 1816 also owed its origins to the law of habeas corpus. It was entitled "An Act for the more effectually detaining in Custody *Napoleon Buonaparté*," 56 Geo. 3, c. 22 (1816) (Eng.), and was passed specifically to render lawful the continued detention of Bonaparte notwithstanding the end of the Napoleonic wars by deeming him to be a "Prisoner of War" and so to have no right to habeas corpus. See 1 Arnold Duncan, Lord McNair, International Law Opinions 104–07 (1956), explaining the origins of the Act and how Admiral Lord Keith (the commander in chief of the English Channel fleet) had been "'chased all day by a lawyer with a *Habeas Corpus*!'" *Id.* at 105 (citation to internal quotation omitted). It is important to note that it was not open to the Executive simply to declare Bonaparte to be a Prisoner of War, and that the intervention of Parliament by specific legislative enactment was required. The 1862 Habeas Corpus Act, 25 & 26 Vict., c. 20, is also of significance and is referred to below.

Over the last four centuries English judges and lawyers have repeatedly emphasized the importance of the writ of habeas corpus and its fundamental purpose—namely to provide a speedy and effective means to test the lawfulness of any detention and thus to protect the liberty of the individual; and the jurisdiction of the High Court in England to grant the writ has been consistently recognized as extending to any part of the King's dominions. Blackstone described the writ thus:

> "[T]he great and efficacious writ in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; * * *. This is a high prerogative writ, * * * running into all parts of the king's dominions: for the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."[18]

The breadth of the remedy was reaffirmed in the House of Lords by the Earl of Birkenhead in *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A.C. 603 (appeal taken from Eng.), when he said the following (at 609):

> "We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law. The writ with which we are concerned to-day was more fully known as habeas corpus ad subjiciendum. * * * It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege."

[18]3 William Blackstone, Commentaries *131.

II. As a matter of English law the writ of habeas corpus will not be refused to any person within the jurisdiction of the Crown on the ground that he or she is an alien.

Innumerable judicial statements to the same effect as that made by the Earl of Birkenhead could be cited. In some of them the right to liberty which is protected by the writ has been described as a right of "the subject," "the liege," or "the citizen." It has, however, long been accepted that the remedy is equally available to aliens.[19] In the case of *Khera* v. *Secretary of State for the Home Dep't* and *Khawaja* v. *Secretary of State for the Home Dep't*, [1984] A.C. 74 (appeal taken from Eng.), the applicants for habeas corpus were, respectively, an Indian national and a Pakistan national, held in the United Kingdom pending their removal pursuant to orders made by an immigration officer. In the course of his judgment (with which, on this point, none of the other members of the House of Lords disagreed), Lord Scarman stated that the question of a detained person's nationality is irrelevant to his right to the writ of habeas corpus. He said (at 111–12):

> "Habeas corpus protection is often expressed as limited to 'British subjects.' Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the black' in *Sommersett's Case* (1772) 20 St. Tr. 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of

[19]Other than enemy aliens (as to whom see note 7 *supra* and Part V below) and prisoners of war to whom different considerations have been held to apply (as to which see note 8 *supra*).

words excluding the judicial review our law normally accords to those whose liberty is infringed."

Other cases illustrating the irrelevance of nationality in habeas corpus are referred to below. The signatories to this brief know of no English or Commonwealth case where the writ has been refused to any person within the jurisdiction of the Crown on the ground that he or she is an alien.

III. The writ of habeas corpus is a flexible remedy adaptable to changing circumstances.

Consistent with its underlying purpose the writ of habeas corpus has always been treated as a flexible remedy. In the context of the Court's powers to issue the writ to prevent removal of a foreign immigrant seeking to challenge deportation, Lord Justice Taylor (later the Lord Chief Justice of England and Wales) observed in *Regina* v. *Secretary of State for the Home Dep't, ex parte Muboyayi*, [1992] Q.B. 244, 269 (C.A.):

> "The court must inherently have the power to prevent its decision from being pre-empted by administrative action. The great writ of habeas corpus has over the centuries been a flexible remedy adaptable to changing circumstances."

IV. As a matter of English law, jurisdiction for the purposes of the writ of habeas corpus is established when the detained person is placed under the control of the Crown or enters territory under the Crown's control whether or not the Crown claims sovereignty over that territory.

In the passage from the *Khawaja* decision quoted above Lord Scarman said that the writ was available to "[e]very person within the jurisdiction." Although the *Khawaja* case related to an individual within the United Kingdom, the central question, as Lord Scarman indicated, was whether the individual seeking to invoke the remedy of habeas corpus could be said to be "within the jurisdiction" of the United Kingdom. As a matter of English law "jurisdiction" in this context is established when the individual is placed under the control of the Crown or enters territory under the Crown's control. What is determinative in habeas corpus jurisdiction is whether the officers of state to whom the writ is directed have effective control over the detained person, and whether those officers are themselves subject to the jurisdiction of the court. If the United Kingdom Parliament has assumed power to make laws applicable to a particular territory or if the United Kingdom Executive has applied and enforced United Kingdom law there, then there is no doubt that that territory would be regarded as being within United Kingdom jurisdiction. See, *e.g.*, *The King* v. *The Earl of Crewe, ex parte Sekgome*, [1910] 2 K.B. 576, 606 (C.A.), per Vaughan Williams, L.J., discussed *infra*.

That the English Courts in exercising this jurisdiction have looked to actual control over territory and not to concepts of legal sovereignty is evidenced by a line of cases extending over two and a half centuries. We refer to the principal cases below.

***Rex* v. *Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B. 1759):**

The issue in this case was whether the writ of habeas corpus could issue to Berwick which had been acquired by conquest from Scotland, but not formally incorporated within England, and which remained governed by its own charter. Lord Mansfield, Chief Justice, giving the judgment of the Court did not find it necessary to determine the precise legal status of Berwick. He held that:

> "Writs * * * such as writs of * * * habeas corpus * * * are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England.

> "There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England * * *." 2 Burr. at 855–56, 97 Eng. Rep. at 599.

"Dominion" in 1759 had no technical meaning. Nor was "subjection" in this context a technical term. It implied no more than actual control and power. In *Ex parte Mwenya*, [1960] 1 Q.B. 241, 310 (C.A.), (to which we shall return in more detail below), Lord Justice Sellers said of this statement of Lord Mansfield:

> "Lord Mansfield gave the writ the greatest breadth of application which in the then circumstances could well be conceived. * * * 'Subjection' is fully appropriate to the powers exercised or exercisable by this country irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the Crown in the place concerned."

***Ex parte Anderson*, 3 El. & El. 487, 121 Eng. Rep. 525, 30 L.J.Q.B. 129 (Q.B. 1861):**

In this case the English High Court issued a writ to the sheriff of the County of York in Canada, and to the keeper of the gaol of Toronto in that county, to bring up the body of an American slave, John Anderson.[20] In granting the writ Chief Justice Cockburn acknowledged that the colony had both legislative and judicial independence, but continued as follows:

> "Nevertheless, it is to be observed that, in establishing a local judicature in Canada, our Legislature has not gone so far as expressly to abrogate the right of the superior Courts at Westminster to issue the writ of habeas corpus to that province * * *. [W]rits of habeas corpus have

[20]Although described in the judgment as a "British subject," Anderson was a slave from Missouri who had fled to Canada. See 5 Judicial Cases Concerning American Slavery and the Negro 345–47 (Helen Tunnicliff Catterall & James J. Hayden eds., Octagon Books 1968) (1937).

> been and may be issued into all parts of the dominions of the Crown of England, wherever a subject of the Crown is illegally imprisoned or kept in custody. * * * [A]nd as the writ has issued even into dominions of the Crown in which there is an independent local judicature; we think that nothing short of legislative enactment would justify us in refusing to exercise the jurisdiction, when called upon to do so for the protection of the personal liberty of the subject." 3 El. & El. at 494, 121 Eng. Rep. at 527–28.

This decision illustrated the broad territorial scope of the writ of habeas corpus. Moreover, as Anderson was an American slave, it is evident that the use of the term "subject" was not equated with the status of citizenship.

The Habeas Corpus Act of 1862, 25 & 26 Vict., c. 20, was passed in response to the controversy in Canada created by the decision in *Ex parte Anderson*.[21] It was described by its preamble as "An Act respecting the Issue of Writs of Habeas Corpus out of *England* into Her Majesty's Possessions Abroad." Section 1 provided that:

> "No Writ of Habeas Corpus shall issue out of *England*, by Authority of any Judge or Court of Justice therein, into any Colony or Foreign Dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having Authority to grant and issue the said Writ, and to ensure the due Execution thereof throughout such Colony or Dominion."

The Act makes it clear that if the local courts in a British colony or "Foreign Dominion"[22] could not effectively issue

[21]David Clark & Gerard McCoy, The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth 158 (2000).

[22]"Foreign Dominion" is an unusual phrase. It has been held to mean "some territory which at some time formed part of the dominions of some foreign potentate, but which has now become, by conquest or cession, part of the dominions of the Crown of England." See *Ex parte Browne*, 5

and enforce the writ, the High Court in England retained the power to do so, emphasising the Crown's broad jurisdiction over habeas corpus and recognizing the fundamental need for at least one court to exist that can "ensure the due Execution" of the writ in any place under British control.

Notwithstanding the 1862 Act, *Ex parte Anderson* remains authority for the proposition that the writ is available to citizens and non-citizens alike and for cases where there is no local court capable of granting or issuing the writ.[23]

***The King* v. *The Earl of Crewe, ex parte Sekgome*, [1910] 2 K.B. 576 (C.A.):**

This case related to the English Court's jurisdiction to issue a writ of habeas corpus to the Protectorate of Bechuanaland. The Protectorate was not part of the Crown's dominions within the meaning of the 1862 Act,[24] nor did the British Government assert sovereignty over it. It did, however, control and administer the territory. On the evidence of the Secretary of State for the Colonies it was merely a "foreign country within which [the Crown] had power and jurisdiction by treaty, grant, usage, sufferance, or other lawful means * * * [and] that it had never been acquired by settlement, or ceded to, or conquered, or annexed by His Majesty or any of his

B.&S. 280, 10 L.T.R. 458, 459 (Q.B. 1864), per Cockburn C.J.; Kenneth Roberts-Wray, Commonwealth and Colonial Law 76–77 (1966).

[23]One obvious illustration of the continued importance of *Ex parte Anderson* as an authority is the case of *Ex parte Sekgome*, to which we turn next. In his judgment Vaughan Williams, L.J., cited the case as support for his conclusions that the writ of habeas corpus could run to "any country or place under the subjection of the Crown of England." [1910] 2 K.B. at 592, 605, 606. See also the reliance placed on *Ex parte Anderson* by Lord Evershed, M.R., in *Ex parte Mwenya*, [1960] 1 Q.B. at 293–94, and, in the same case, by Lord Justice Sellers, *id.* at 308–09, discussed *infra*.

[24]See [1910] 2 K.B. at 591–92, per Vaughan Williams, L.J., and at 622–23, per Kennedy, L.J.

Royal predecessors * * *."[25] The writ was sought on behalf of an individual who claimed to be the chief of a native tribe but nevertheless a British subject. Counsel for the Respondent—the Secretary of State for the Colonies—conceded that it was immaterial whether or not the applicant was a British subject.[26] The Court nevertheless considered that concession to have been well-founded and to accurately represent the law.[27] Moreover, the majority (Lord Justice Vaughan Williams and Lord Justice Farwell[28]) held that the writ ran to the Protectorate, notwithstanding that it was not a British colony or dominion.

Lord Justice Vaughan Williams indicated that it was the fact of presence in territory under the control of the State and the assertion of power over the individual by the State—not sovereignty or nationality based ties to the State—which triggered the protection of the writ. He said (at 592) that "the writ may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner." Later he added (at 606):

> "In the present case the King has every means of enforcing obedience. The Crown * * * has established laws which the dwellers in the Protectorate, whether natives or mere residents, must obey, and from which they surely must be entitled to receive protection when injured. Is the mere fact of absence of annexation and theoretical possession to deprive the Crown and those who are under the law from the benefits and power of the writ of habeas?"

Lord Justice Farwell also indicated that he considered the crucial issue to be control on the part of the proposed

[25]See [1910] 2 K.B. at 577.

[26]See *id.* at 580.

[27]See, *e.g.*, *id.* at 606, per Vaughan Williams, L.J., and at 620, per Kennedy, L.J.

[28]Kennedy, L.J, dissented on this point at 624.

respondent rather than the precise legal status of the territory where the applicant was detained. He said the following (at 618):

> "Where a man who owes obedience to laws imposed by England is imprisoned and kept imprisoned without trial in a place maintained by England, and placed under the control of an officer of the Crown who acts under the orders of the Colonial Office, and who has acted in the particular case with the assent and approval of and is supported by the Colonial Office, I should be slow to conclude that the Secretary of State could not be called on to make a return to the writ."

Lord Justice Kennedy (who rejected the availability of the writ on different grounds) stated, however, that he considered that the question as to whether or not the applicant was a British subject was an irrelevance, and that the key issue was whether or not he was detained under British authority.[29] He said:

> "In my opinion the mere fact that a person in detention ought to be considered as not being in the strict sense of the term a British subject could not in itself be treated as impairing the jurisdiction of the High Court of Justice to direct the issue of the writ, if it were shewn that his custodian was detaining him within a British dominion and claiming so to detain him in the exercise of powers conferred upon him by British jurisdiction. The remedy obtainable by the writ of habeas corpus is not confined to British subjects. * * * [If] Gaberones, where Sekgome is

[29]Lord Justice Kennedy (at 624) held that the writ could not be issued beyond territories which were formally "dominions" of the Crown, but in this respect as we have already indicated he was alone—Lord Justice Vaughan Williams and Lord Justice Farwell preferred the opposite conclusion. See *id.* at 592, 605–06, per Vaughan Williams, L.J., and at 618, per Farwell, L.J.

> detained, can rightly be held to be within the foreign dominions of the Crown, I do not think that the jurisdiction of the High Court of Justice to issue the writ of habeas corpus could be affected in any way by the fact that Sekgome is not a British subject." *Id.* at 620–21.

***The King* v. *Secretary of State for Home Affairs, ex parte O'Brien*, [1923] 2 K.B. 361 (C.A.):**

In this case the applicant, O'Brien, was said to be a ringleader of an illegal organization which had as its purpose the overthrow of the Governments in Southern and Northern Ireland and the commission of acts of violence in England. O'Brien was arrested in London and sent by the British authorities to Mountjoy Prison in Dublin in the Irish Free State where he was detained. The Irish Free State was then a self-governing British Dominion with its own parliament and executive. O'Brien applied to the High Court in London for a writ of habeas corpus. The writ was refused by the Divisional Court but granted by the Court of Appeal. Notwithstanding the fact that the respondent—the Secretary of State—had lost legal control over O'Brien by handing him over to the Irish Free State Government, the Court of Appeal held that there was sufficient doubt whether the Secretary of State nonetheless retained de facto control to justify the issue of the writ so that the question of control might be definitively determined on the return. Lord Justice Atkin summarized the matter in the following passage (at 397–98):

> "Having come to the definite conclusion that the order made by the Home Secretary is invalid and that the imprisonment of the applicant thereunder is unlawful, it only remains to consider whether the writ should go to the Home Secretary. I think that the question is whether there is evidence that the Home Secretary has the custody or control of the applicant. Actual physical custody is obviously not essential. 'Custody' or 'control' are the

phrases used passim in the opinions of the Lords in *Barnardo* v. *Ford* [[1892] A.C. 326)], and in my opinion are a correct measure of liability to the writ. It was said that the Applicant was in a dilemma, for having relied on the absence of control as constituting the invalidity of the order he is said to debar himself from asking that the writ should go to the Home Secretary as having control, and the Attorney General relied upon the absence of control as fatal to the applicant's motion for the writ. In truth there seems to be no dilemma. In testing the validity of the order [of detention] the question is as to the legal right to control; in testing the liability of the respondent to the writ the question is as to de facto control. In all cases of alleged unjustifiable detention such as arise on applications for the writ of habeas corpus the custody or control is ex hypothesi unlawful; the question is whether it exists in fact."[30]

The case of *Barnardo* v. *Ford*, [1892] A.C. 326 (appeal taken from Eng.), to which Lord Justice Atkin referred, concerned an application for habeas corpus in respect of a child and directed to Dr Barnardo, the head of an institution for destitute children in which the child had been placed. It appeared that before the proceedings began Dr Barnardo had handed the child over to another person to be taken to Canada, and he alleged that he did not know the address of that person or where the child was and that there being no relevant control there was therefore no jurisdiction for the issue of the writ. The High Court, Court of Appeal, and

[30]See also [1923] 2 K.B. at 381, per Lord Justice Bankes, and at 391–92, per Lord Justice Scrutton. Most English lawyers would agree that these three Lord Justices constituted the most powerful English Court of Appeal of the first half of the 20th Century.

House of Lords nevertheless considered that the issue of the writ of habeas corpus was appropriate.[31]

***Ex parte Mwenya*, [1960], 1 Q.B. 241 (C.A.):**

This case concerned the jurisdiction of the High Court in England to issue a writ of habeas corpus to the Protectorate of Northern Rhodesia. Like Bechuanaland in Sekgome's case Northern Rhodesia was described as a "'foreign country within which Her Majesty has power and jurisdiction by treaty, grant, usage, sufferance and other lawful means,'"[32] and where, for the purposes of the argument, it was assumed that there was no court in Northern Rhodesia competent to give equivalent relief.[33] The Crown submitted that the only test for

[31] The leading judgment in the House of Lords was that of Lord Herschell. He stated as follows (at 339):

> "Where any tribunal believes that a person is or *may be* [emphasis added] under detention in unlawful custody, and issues a writ of habeas corpus accordingly, no Court of Appeal ought lightly to interfere with the issue of the writ. The order for its issue ought only to be set aside if there be, beyond question, no ground for it. If, for example, in the present case it had been an admitted fact that before notice of the application for the writ the appellant had ceased to have the custody of or any control over the boy alleged to be detained, that might have been ground for reversing the order of the Queen's Bench Division. But where the Court entertains a doubt whether this be the fact [*i.e.*, whether custody or control has ceased prior to the application for issue of the writ], it is unquestionably entitled to use the pressure of the writ to test the truth of the allegation, and to require a return to be made to it."

In holding that the Court had jurisdiction to determine whether control was in fact established so as to justify the issue of the writ, the House of Lords' decision also provides support for the analogous position we set out below relating to the Court's jurisdiction to determine the existence or otherwise of enemy alien status for the purposes of determining jurisdiction to issue the writ.

[32]See [1960] 1 Q.B. at 265, quoting affidavit.

[33]See judgment page, *id.* at 290.

the availability of the writ was one of territorial sovereignty[34] and that that test was failed on the facts of the case. Each member of the English Court of Appeal rejected this argument, concluded that the writ of habeas corpus could issue to any place under the "subjection" of the Crown and emphasized the necessity of considering the actual nature of the Crown's control over the territory in question, and so over the detention under challenge. The following were the key passages in the judgments:

> "As a matter of history and logic, the availability of the 'most efficient protection ever invented for the liberty of the subject' should not depend upon a mere label or on matters of convenience. * * *
>
> "* * * [T]he jurisdiction ought not to be limited to territories, outside England, which are strictly labelled 'colonies or foreign dominions' but will extend to territories which, having regard to the extent of the dominion in fact exercised, can be said to be 'under the subjection of the Crown' and in which the issue of a writ will be regarded (in Lord Mansfield's words) as 'proper and efficient.'" [1960] 1 Q.B. at 303, per Lord Evershed, M.R.[35]
>
> "[I]n territory in which the Crown, on the advice of Parliament, has assumed such a degree of power and control that the protected State is to all intents and purposes a British possession and in which the writ, if issued, would certainly be effective in its results, it is difficult to see why the sovereign should be deprived of her right to be informed through her High Court as to the validity of the detention of her subjects in that territory. The contrary view would result in a subject having no redress at all if he were detained, however unlawfully, in a protectorate

[34]See argument of Counsel for the Secretary of State, *id.* at 285.

[35]See also Lord Evershed, M.R., *id.* at 297, and Lord Justice Romer, *id.* at 305.

> which was in substance a colony but which had no effective courts of its own." *Id.* at 305, per Lord Justice Romer.
>
> "There may come times in a country's history when it may appear highly inconvenient or politically hazardous that the law should pursue its course, but in a court of law such considerations are irrelevant and cannot serve to deprive a subject of a right which an English court could give and enforce.
>
> "* * * *
>
> "* * * The writ is concerned with personal freedom and the emphasis in principle, it would seem, is not on where the wrongful detention is occurring but, assuming the court is satisfied that the detention is without justification whether it can, having regard to the proper interests, rights and powers of those governing the place of detention, make an order which can be enforced and so release an applicant who has asked for justice before it.
>
> "* * * *
>
> "The judges in the earliest cases had not in mind the issue which arises here, but I think it would be difficult to read into any of them * * * a refutation of the powers of the English Court to issue the writ to safeguard a subject's freedom in a territory over which this country had wide powers of jurisdiction and control, wide enough to enforce as a matter of ordinary administration any order the court might make." *Id.* at 308–09, per Lord Justice Sellers.[36]

[36]Another case decided prior to 1960 to which we should refer is *In re Ning-Yi-Ching*, 56 T.L.R. 3 (K.B. 1939). This was a first instance Vacation Court decision, and it has sometimes been cited as support for the contention that the writ of habeas corpus does not run to foreigners in foreign territory. We do not, however, believe that the case was correctly decided or that it can stand with the appellate decisions we refer to. The judge, Mr. Justice Cassels, purported to follow the judgment of Lord

***Regina (Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2001] Q.B. 1067 (Q.B.D. Admin. Ct.):**

This case was concerned with the availability of another prerogative writ[37] to a territory under the Crown's "subjection." The Crown submitted that the territory although a colony, enjoyed a separate and distinct sovereignty[38] and that as a result the writ of the High Court in London could not run there. Lord Justice Laws and Mr. Justice Gibbs rejected this

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Justice Kennedy in *Ex parte Sekgome*. Mr Justice Cassels overlooked, however, both the fact that Lord Justice Kennedy was in the minority and the fact that Lord Justice Kennedy himself considered the nationality of the detained person to be irrelevant to the jurisdiction to issue the writ. Furthermore the result in the case was explicable by virtue of the fact that, under the treaties governing the concession in Tientsin (*i.e.*, the municipal area in Tientsin allotted to the United Kingdom) in which the detained persons were held, the British authorities had no jurisdiction over non-nationals and that there was another local court before which the detention could be challenged. In any event subsequent decisions have made it clear that Mr Justice Cassels's approach was not correct and is not to be followed. In *Ex parte Mwenya*, Lord Evershed, M.R., considered Lord Justice Kennedy's minority judgment in *Ex parte Sekgome* and its adoption in *In re Ning Yi-Ching* and commented (at 295) "[i]t is nonetheless clear that the other two members of this court took a different view upon this matter" while Lord Justice Sellers also stated (at 310–11) that he agreed with the approach taken by Lord Justice Vaughan Williams rather than Lord Justice Kennedy. The Court of Appeal has therefore held that the views of Mr Justice Cassels and Lord Justice Kennedy did not represent English law. Mr. Justice Cassels's approach is also irreconcilable with the more recent decisions of the Divisional Court in *Regina (Bancoult)*, v. *Secretary of State for Foreign and Commonwealth Affairs*, [2001] Q.B. 1067 (Q.B.D. Admin. Ct.), and the Court of Appeal in *The Queen (on the application of Abbasi)* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598, [2002] All E.R. (D) 70 (Nov.), to which we refer in more detail below.

[37]The writ of certiorari to quash an ordinance passed by the Commissioner exercising powers over a British Indian Ocean Territory.

[38]See *id.* at 1072 & 1086, ¶ 21.

argument. Referring to the writ of habeas corpus and to *Ex parte Mwenya*, Lord Justice Laws said:

> "[I]t is plain that the court in *Ex p Mwenya* * * * saw nothing in any earlier jurisprudence * * * to inhibit them from concluding that the writ of habeas corpus might in a proper case issue beyond the seas, 'to any place under the subjection of the Crown.' Indeed the weight of authority pointed firmly towards just such a conclusion."[39]

In reaching this conclusion Lord Justice Laws expressly endorsed the dictum of Lord Justice Farwell in *Ex parte Sekgome* (at 618) cited above.

***The Queen (on the application of Abbasi)* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598, [2002] All E.R. (D.) 70 (Nov.):**

This case was brought in the English courts on behalf of a British national captured by United States forces in Afghanistan and held at Guantanamo Bay since January 2002. He sought an order to compel the United Kingdom Secretaries of State to make representations on his behalf to the United States Government. His claim was founded on the contention that his "fundamental human right" not to be arbitrarily detained had been infringed because he had been denied access to a court, the United States District Court for the District of Columbia having dismissed habeas corpus applications by other British subjects held at Guantanamo Bay for want of jurisdiction—*Rasul* v. *Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), Pet. App., No. 03-343, at 33. His submission was that in these circumstances the Secretaries of State owed him a duty under English law to take steps to redress the position.

The English Court of Appeal, presided over by the Master of the Rolls, held that the denial of access to a court in Abbasi's case was in conflict with the fundamental principles of

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[39]See *id.* at 1091, ¶ 26.

English law and of public international law. The Court stated its belief that United States law recognized the same principles. The Court emphasised (paragraph 65) that Abbasi's detention as an alleged "enemy combatant" might prove to be justified, and that the United Kingdom also had legislation to deal with suspected international terrorists.[40] Nonetheless the Court said:

> "66. What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. The question for us is what attitude should the courts in England take pending review by the appellate courts in the United States, to a detention of a British Citizen the legality of which rests (so the decisions of the United States Courts so far suggest) solely on the dictate of the United States Government, and, unlike that of United States' citizens, is said to be immune from review in any court or independent forum."

In the result the Court of Appeal held that it could not compel the Secretaries of State to intervene by diplomatic or any other means. The judgment is, however, further clear and weighty authority for the propositions that neither the nationality of the detained person nor the absence of sovereignty over the place of detention would preclude an English Court from entertaining a habeas corpus application, provided that the authority in ultimate or actual control of the detained

[40]We understand that the Petitioners deny that they are or have been enemy combatants or members of any terrorist group and that no evidence to the contrary has been disclosed by the United States Government in respect of any of them. Pet., No. 03-334, at 3; Pet., No. 03-343, at 2–3.

person was subject to the Court's jurisdiction. We refer the Court to the whole of the judgment, but for convenience set out some further passages of importance:

> "59. The United Kingdom and the United States share a great legal tradition, founded in the English common law. One of the cornerstones of that tradition is the ancient writ of habeas corpus * * *. The court's jurisdiction was recognised from early times as extending to any part of the Crown's dominions * * *.
>
> "60. The underlying principle, fundamental in English law, is that every imprisonment is prima facie unlawful * * *. This principle applies to every person, British citizen or not, who finds himself within the jurisdiction of the court: 'He who is subject to English law is entitled to its protection' * * *. It applies in war as in peace; in Lord Atkin's words (written in one of the darkest periods of the last war):
>
> > 'In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.' (*Liversidge v Anderson* [1942] AC 206, 245 [*sic*] at p.244)
>
> "* * * *
>
> "63. The recognition of this basic protection in both English and American law long pre-dates the adoption of the same principle as a fundamental part of international human rights law. * * *
>
> "64. For these reasons we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'."

In conclusion (at ¶ 107.iii) the Master of the Rolls said:

"The position of detainees at Guantanamo Bay is to be considered further by the appellate courts in the United States. It may be that the anxiety we have expressed will be drawn to their attention. We wish to make it clear that we are only expressing an anxiety that we believe was felt by the Court in *Rasul*. As is clear from our judgment, we believe that the United States courts have the same respect for human rights as our own."

V. As a matter of English law the question whether a detained person is properly to be categorized as an enemy alien is a matter within the jurisdiction of the Court and to be determined by the Court and not the Executive.

It appears to be common ground between the petitioners and the Government that the petitioners are not "enemy aliens" within the primary meaning of that term.[41] The Government contends, however, that the petitioners are, nevertheless enemy aliens because at the time of their capture they were "actual enemies, active in the hostile service of an enemy power."[42] That assertion is disputed on behalf of the Petitioners, and it is denied that they have ever engaged in hostilities against the United States of America.[43] As a matter of English law the issue thus joined between the parties would fall to be resolved by the Court on the evidence presented. It would not be open to the Executive to contend that this issue was non-justiciable and outside the Court's jurisdiction. We set out below the principal authorities which show this to be the case.

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[41] *I.e.*, citizens of a state at war with the United States. *Johnson* v. *Eisentrager*, 339 U.S. at 769 n.2.

[42] Br. in Opp., Nos. 03-334 & 03-343, at 14.

[43] See *Al Odah* v. *United States*, 321 F.3d 1134, 1140 (D.C. Cir. 2003), Pet. App., No. 03-343, at 11.

***Rex* v. *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759):**

This case related to a Swedish sailor detained in a Liverpool gaol having been captured aboard a French ship. Although England and France were at war, Sweden was a neutral power and the applicant sought a writ of habeas corpus contending that he had been forced to serve on the French vessel under duress. Although the Reporter queried the correctness of the decision where duress was involved, the Court held that on Schiever's "own shewing" he was "clearly a prisoner of war, and lawfully detained as such," 2 Burr. at 766, 97 Eng. Rep. at 552, and the application for the writ was refused. The Court decided the case on the evidence presented and not on the basis of any assertion that Schiever was an enemy alien. There was no suggestion that the Court lacked jurisdiction to consider the evidence and determine Schiever's status on the basis of that evidence.

***Anonymous—The Case of Three Spanish Sailors*, 2 Black. W. 1324, 96 Eng. Rep. 775 (K.B. 1779):**

In this case three Spanish sailors asserted that they had been captured as prisoners of war on board a Spanish privateer and carried to Jamaica. They had then been persuaded to enter into service on board a merchant vessel and promised wages and their release on the vessel's return to England. On arrival in England, however, the Captain of the vessel, a Captain Lush, refused to pay the agreed wages and instead handed the men over to the Commander of a naval vessel as prisoners of war. The Court refused the subsequent application for a writ of habeas corpus but, again, did so on the basis of the evidence presented. The Court rejected the application in the following terms "these men, upon their own shewing, are alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus. The story, as related by them, is not much to the credit of Captain Lush; but we can give them

no redress." 2 Black. W. at 1324, 96 Eng. Rep. at 776. Again there was no suggestion that the Court lacked jurisdiction to consider the evidence and to determine the sailors' status on the basis of that evidence.

***Ex parte Weber*, [1916] A.C. 421 (appeal taken from Eng.):**

The applicant in this case, Weber, was a German-born man who had left Germany in 1898 and had remained abroad since that time. On the outbreak of the First World War he was interned as an enemy alien. He applied for a writ of habeas corpus contending that as a result of German legislation he had lost his German nationality and so was not an enemy alien. The High Court, Court of Appeal, and House of Lords accepted that the Court had jurisdiction to consider the issue but held, on the evidence, that it could not be said that the applicant had so divested himself of his German nationality that he could be treated as though he no longer remained a German citizen. He remained, therefore, an enemy alien and the writ was refused on the facts.

***The King* v. *Superintendent of Vine Street Police Station, ex parte Liebmann*, [1916] 1 K.B. 268:**

This was another First World War internment case and followed shortly after *Ex parte Weber* had been decided. Although the application was unsuccessful, it represents further authority from the Divisional Court that the English Court does have jurisdiction to determine whether an individual seeking habeas corpus relief is in fact an enemy alien. As Mr Justice Low (with whom Mr Justice Bailache agreed) said (at 277), "The first question we have to determine is whether the applicant is an alien enemy." The judge then went on to recite the facts of the case before concluding that Liebman was indeed an alien enemy. As in Weber's case it was clear that the Court was not simply accepting the assertion made by the Executive to this effect but exercising its own jurisdiction to consider and resolve the issue.

CONCLUSION

If it were the United Kingdom, and not the United States of America, which controlled the Guantanamo Bay Naval Base and the detained persons held there, then, in accordance with English law as it has been since at least 1772, the writ of habeas corpus would be available before the English Courts regardless of the nationality of the detained persons, and it would be the English Courts and not the Executive which would be responsible for determining any issue relating to any "enemy" status alleged against the detained persons. We are, furthermore, unaware of any authority indicating that the position would be any different in any other Commonwealth State.

Respectfully submitted,

SIR SYDNEY KENTRIDGE, Q.C.
Brick Court Chambers
7-8 Essex Street
London WC2R 3LD
44 207 379 3550

STEPHEN J. POLLAK*
JOHN TOWNSEND RICH
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

COLIN NICHOLLS, Q.C.
3 Raymond Buildings
London WC1R 5BH
44 207 400 6400

TIMOTHY OTTY, BARRISTER
20 Essex Street
London WC2R 3AL
44 207 842 1200

Attorneys for the Commonwealth Lawyers Association

January 14, 2004

**Counsel of Record*

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

(21) (21)

Nos. 03-334 and 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, ET AL., PETITIONERS

v.

GEORGE W. BUSH, ET AL., RESPONDENTS.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* ABDULLAH AL-JOAID IN SUPPORT OF PETITIONERS

MARY PATRICIA MICHEL
Counsel of Record
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7339

Counsel for Amicus Curiae Abdullah Al-Joaid

QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Abdullah Al-Joaid is a Saudi Arabian citizen who is the brother of a Saudi national confined in Guantanamo Bay, Cuba. As a relative of a Guantanamo Bay detainee, *amicus curiae* has interests in these cases that are identical to those of Petitioners, who are relatives of Guantanamo Bay detainees from other countries (Britain, Australia and Kuwait). *Amicus curiae* respectfully submits this brief to inform the Court about the impact of these cases from the perspective of the families of the Saudi detainees currently held at Guantanamo Bay.[1]

SUMMARY OF THE ARGUMENT

The families of the Saudi detainees bring a perspective to these cases that only the relatives of the other Guantanamo Bay detainees can share. The detentions have caused substantial hardship on the Saudi families because they are unable to contact those confined and there is no way of determining the accuracy of information available about their condition. The future of the detainees in the custody of the U.S. Government, whether or not they have committed any offenses, is still uncertain after two years of confinement. Saudi Arabia would prefer to have its nationals repatriated for investigation and possible trial and punishment under Islamic law and in Saudi courts. However, diplomatic efforts to date have been unable to achieve this result. The exercise of jurisdiction by U.S. courts over the detainees could facilitate a resolution to this matter.

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[1] The parties to both cases have consented to the filing of this brief, and the documents reflecting consent have been filed with the Clerk's Office. In addition, pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT U.S. COURTS HAVE JURISDICTION TO CONSIDER CHALLENGES TO THE LEGALITY OF DETENTIONS OF FOREIGN NATIONALS IN GUANTANAMO BAY, CUBA

Amicus curiae respectfully submits that this Court should hold that U.S. courts have jurisdiction to consider challenges to the legality of the detentions of foreign nationals captured abroad and incarcerated in Guantanamo Bay, Cuba. *Amicus curiae* incorporates by reference the Petitioners' legal arguments demonstrating that jurisdiction exists. Absent a finding that jurisdiction exists, there may be no end in sight to the detainees' confinement. Jurisdiction over the legality of the detentions could expedite a resolution.

II. COURT ACTION IS NEEDED TO ENSURE JUST TREATMENT OF THE DETAINEES

Saudi Arabia is seeking repatriation of its nationals for possible trial and punishment or their release if there is no evidence of involvement with terrorist or criminal activity. The families of the Saudi detainees believe that repatriation or release of the Guantanamo detainees is appropriate, in addition to being beneficial to U.S. interests. The exercise of jurisdiction by U.S. courts over the legality of the Guantanamo detentions that Petitioners request could encourage this result.

A. The Families of the Saudi Detainees Are Seeking Their Repatriation or Release

The events of September 11, 2001 shocked and outraged people in the United States of America and throughout the world. The Kingdom of Saudi Arabia was among the first of many voices condemning these horrific acts and expressing

sympathy for the innocent victims and their families.[2]

In denouncing these criminal acts as a violation of principles of human decency and a callous disregard for human life, the Kingdom reinforced its commitment in support of international conventions against terrorism. Its statements of denunciation expressed the doctrines of Islam, which forbid aggression and call for tolerance and peace.[3]

In the wake of the September 11 attacks, military operations in Afghanistan against al-Qaeda and the Taliban resulted in the arrest and confinement of approximately 127 Saudi nationals at the U.S. naval base in Guantanamo Bay, Cuba.[4] The U.S. Government concluded that these individuals were not entitled to due process under the U.S. Constitution or to treatment as prisoners of war under the Geneva Convention. This was so even though U.S. officials acknowledged that many likely had committed no offenses. *See* Greg Miller, *Many Held at Guantanamo Not Likely Terrorists*, L.A. Times, Dec. 22, 2002, *available at*

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[2] *See, e.g.*, Royal Embassy of Saudi Arabia, Wash., D.C., *Kingdom Condemns Attacks on United States* (Sept. 11, 2001), *available at* http://saudiembassy.net/2001News/Press/2001Press.asp ("Saudi Arabia strongly condemns such acts, which contravene all religious values and human civilized concepts; and extends sincere condolences to the families of the victims"); Royal Embassy of Saudi Arabia, Wash., D.C., *Kingdom Cancels National Day Celebrations* (Sept. 17, 2001), *available at* http://saudiembassy.net/2001News/Press/2001Press.asp (reporting that "senior religious and legal scholars of Saudi Arabia have also denounced the barbaric events of September 11").

[3] *See* Royal Embassy of Saudi Arabia, Wash., D.C., *Condemnation of Terrorism: Statement by H.E. Shaikh Salih bin Muhammad Al-Luheidan Chairman of the Supreme Judicial Council of the Kingdom of Saudi Arabia* (Sept. 14, 2001), *available at* http://saudiembassy.net/PressLink/01-spa-terrorism-01.asp.

[4] *See Team of Lawyers to Defend Saudi Inmates in Guantanamo*, Arab News, Apr. 29, 2003, *available at* http://www.arabnews.com.

http://www.latimes.com/la-na-gitmo22dec22,0,2294365.story; Stuart Taylor, Jr., *Bush Sees "Bad People,"* Legal Times, Jul. 28, 2003, at 62.

The fate of the detainees incarcerated in Guantanamo became uncertain and, as time passed, apprehension and concern about their welfare grew in Saudi Arabia. For over two years, families have been unable to contact those in confinement, and the families are alarmed about public reports concerning the detainees, the Guantanamo facility and the conditions under which the detainees are being held. Available information has included reports of inhumane and degrading treatment, attempted suicides and the possibility of death sentences.[5]

The response to the detentions among those directly affected has varied. Rather than pursue legal challenges in U.S. courts, the families of the Saudi detainees chose to seek a negotiated solution. In parallel with the official diplomatic efforts of their Government, the families of the Saudi detainees have been working with a group of senior Saudi lawyers and former diplomats, experts in international law, who are using their good offices to assist in resolving the issue of the detainees.[6]

The Saudi families' specific objectives have included, first and foremost, the release of any innocent persons detained in Guantanamo. With regard to those who might

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[5] *See, e.g.*, Monica Whitlock, *Legal limbo of Guantanamo's prisoners*, BBC News, May 16, 2003, *available at* http://news.bbc.co.uk/2/hi/americas/3034697.stm; Tania Branigan, *Camp Delta Briton claims racial abuse*, The Guardian, Jan. 12, 2004, *available at* http://www.guardian.co. uk/uk_news/story/0,3604,1120943,00.html.

[6] *See* Tania Branigan, *Saudi-U.S. Meeting Touches on Detainees*, Wash. Post, Sept. 6, 2003, at A3; *Team of Lawyers to Defend Inmates at Guantanamo*, Arab News, Apr. 29, 2003, *available at* http://www.arabnews.com.

have committed offenses, the families have requested, to the extent possible, their repatriation for interrogation, trial and punishment by Saudi authorities and courts. The Saudi families have not suggested that any of the detainees who have committed punishable offenses escape justice. The legal systems in Saudi Arabia and the United States share a common view of such acts, and punishment could be even more severe in Saudi Arabia under Islamic law than in the United States.

Saudi diplomatic efforts to reach an alternative resolution have yet to bear significant fruit. Despite mention by Secretary of State Colin Powell in May of an agreement with Saudi authorities for the return Saudi nationals (*see* United States Dept. of State, *Press Conference at the French American Press Club* (May 22, 2003), *available at* www.state.gov/secretary/rm/2003/20909.htm), most of the Saudi detainees remain in Guantanamo.[7] Furthermore, there has been no significant movement to release or try those in confinement under the procedures established by the U.S. Government for sorting the detainees, releasing the innocent, charging the others and bringing those charged to trial.[8] For

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[7] At that time, Secretary Powell discussed expediting the repatriation of people who were unlikely to have committed crimes but just "sort of got caught up in the war." United States Dept. of State, *Press Conference at the French American Press Club* (May 22, 2003), *available at* http://www.state.gov/secretary/rm/2003/20909.htm.

[8] The Ninth Circuit noted that the United States has subjected over six hundred captives to indefinite detention, without any means "to challenge their confinement, to object to the failure to recognize them as prisoners of war, to consult with legal counsel, or even to advance claims of mistaken capture or identity." *Gherebi v. Bush*, No. 03-55785, 2003 WL 22971053, at *3 (9th Cir. Dec. 18, 2003). The Court also took note of the position of top U.S. officials that the detainees may be held in their present circumstances for an undefined period of time that could stretch into decades. *Id.*

these reasons, *amicus curiae* and other relatives of the Saudi detainees have chosen to lend their support to the efforts of the families of other detainees to obtain a solution through the U.S. courts.

In the absence of a meaningful alternative, the Saudi families seek a resolution that provides the detainees with access to justice and due process in the U.S. courts rather than having them indefinitely incarcerated with no resolution in sight, or subjected to untested and controversial military procedures. *See* Kevin J. Barry, *Military Commissions: American Justice on Trial*, The Federal Lawyer, July 2003, at 24 ("Unless substantially modified to more closely reflect *current* court-martial principles and rules, these military commissions will not achieve the level of due process that is characteristic of American criminal justice."). A determination that U.S. courts have jurisdiction to consider the legality of the detentions should ensure the needed measure of justice and due process.

B. Under Islamic Law, Detainees Would Be Interrogated, Tried and Punished If Found Guilty Consistent with Basic Principles of Justice

In construing the scope of due process rights and other protections for criminal defendants afforded by the U.S. Constitution, this Court has informed its decisions by considering the rights of individuals in other countries' legal systems. *See, e.g.*, *Lawrence v. Texas*, 123 S. Ct. 2472, 2481, 2483 (2003) (construing due process liberty interests with reference to decisions of the European Court of Human Rights); *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (plurality opinion of Stevens, J.) (recognizing "the relevance of the views of the international community in determining whether a punishment is cruel and unusual" under the Eighth Amendment); *McGowan v. Maryland*, 366 U.S. 420, 536 (1961) (Frankfurter, J., concurring) (referring to other countries' laws to assess rationality of Maryland

criminal statute under Due Process Clause). In considering these cases, the Court should be aware of the following legal principles under Islamic law, or Shari'a, which would be applied in Saudi Arabia if the detained individuals were subjected to interrogation, trial and possible punishment by Saudi authorities and courts. These principles are remarkably consistent with due process that is generally provided under U.S. law.[9]

1. Islamic law recognizes terrorism as a criminal offense and condemns the act of terrorism committed in any part of the world against any person.

2. Islamic law also teaches that terrorists should be severely punished. In keeping with these teachings and the international conventions against terrorism to which the Kingdom of Saudi Arabia subscribes, the position of the Saudi Government and the Saudi people is that those who commit terrorist acts should be punished. The families of the Saudi detainees recognize that their sons must be punished if, after receiving a fair trial and being able to present a defense, they are found guilty of committing acts that violate Islamic law.

3. Islamic law shares with other legal systems of the world the basic principle that guilt may not be presumed and that a person should be considered innocent until proven guilty.

4. Applying the presumption of innocence to the Guantanamo detainees requires investigating each case on its merits to know if there is evidence that a particular detainee

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[9] *See generally* Vogel, Frank E., *The Trial of Terrorists Under Classical Islamic Law*, 43 Harv. Int'l L.J. 53 (2002); Bassiouni, M. Cherif, *Protection of Diplomats Under Islamic Law*, 74 Am. J. Int'l L. 609 (1980).

is responsible for conduct that warrants a trial and possible punishment. The detainees should be judged on a case-by-case basis.

Consistent with these principles, in the absence of evidence that individual detainees have committed offenses, they should be set free. It is also consistent with Islamic law that the status of the detainees be resolved quickly so that those who are being improperly detained may be returned to their homes and reunited with their families.

Finally, Islamic law establishes that, if evidence demonstrates detainees may be responsible for terrorist acts or other crimes, they should be given a fair trial as quickly as possible with the opportunity to present a defense. It is important that the world community and the citizens of Saudi Arabia understand that those detainees who will be tried and subjected to punishment are being treated humanely and that there will be a just and decisive solution to their cases.

C. The Detentions Have Damaged the Historically Friendly Relations Between the People of Saudi Arabia and the People of the United States

Beyond their immediate impact on the families of those kept in confinement, the detentions of Saudi nationals in Guantanamo have generated widespread negative public reaction in Saudi Arabia. The detentions are adversely affecting many aspects of Saudi relations with Americans, including business and commercial dealings, tourism and even medical care. By giving the Guantanamo detainees neither rights under U.S. law nor treatment as prisoners of war under the Geneva Convention, the United States has altered the perceptions of Saudi citizens of the U.S. commitment to human rights and principles of due process. With the indefinite confinement of Saudi nationals in Guantanamo without the protections of law, the historically strong friendship between the people of Saudi Arabia and the United States continues to suffer.

Negative Saudi perceptions of the situation in Guantanamo cannot be easily dismissed when these same perceptions are shared by U.S. courts. In *Gherebi v. Bush*, No. 03-55785, 2003 WL 22971053, at *3 (9th Cir. Dec. 18, 2003), the U.S. Court of Appeals for the Ninth Circuit recently characterized the U.S. Government's position as "inconsistent with fundamental tenets of American jurisprudence." The Court described the current situation as potentially allowing "unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement." *Id.*

One reason that the families of the Saudi detainees have advocated that the detainees be repatriated for interrogation, criminal proceedings and punishment in accordance with Islamic law is because a judgment by a Saudi court would be more readily accepted by the Saudi people, including the families of the detainees. A verdict by a Shari'a court would prevent concerns or misunderstanding by the families and citizens of the Kingdom that justice is not being fairly administered, perceptions which can often occur between cultures even if such is not the case. However, it is very difficult to expect any country to accept a legal judgment of another if the government of the other country is free to do with foreign nationals "as it will, when it pleases, without any compliance with any rule of law of any kind, without permitting him to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged." *Id.* at *13. Indeed, the Court in *Gherebi* found the Government's position as to its authority over the detainees to be "so extreme that it raises the gravest concerns under both American and international law." *Id.*

Although the United States was reported to have agreed in May 2003 to the release of nearly two-thirds of the Saudi detainees to Saudi authorities pursuant to a negotiated agreement, in fact, only five were released. *See US to Release More Saudi Prisoners*, Arab News, May 26, 2003, *available at* http://www.arabnews.com. The Saudi families will continue to pursue a negotiated solution to the detentions that includes repatriation. However, these diplomatic efforts cannot substitute for the due process rights of the individuals detained even if they are intended to achieve the same result.

A more acceptable solution to the *status quo* is a mechanism that requires the immediate release of innocent detainees, decisions by the U.S. Government as to the offenses with which others will be charged and the scheduling for trial or repatriation of those who are legitimately suspected of committing crimes. U.S. federal court jurisdiction over the Guantanamo detentions will both further the interests of justice and make great strides towards repairing the damage to the relationship between the Saudi and American people resulting from the ongoing detentions.

CONCLUSION

For the reasons discussed above, this Court should reverse the judgment of the court of appeals and remand these cases for further proceedings.

Respectfully submitted,

MARY PATRICIA MICHEL
Counsel of Record
MCKENNA LONG &
ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7339

Counsel for Amicus Curiae
Abdullah Al-Joaid

January 14, 2004

(22) (22)

Nos. 03-334, 03-343

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 2003

SHAFIQ RASUL, ET AL.,

Petitioners,

v.

GEORGE W. BUSH, ET AL.,

Respondents.

KHALED A. F. AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE FRED KOREMATSU IN SUPPORT OF PETITIONERS

GEOFFREY R. STONE
1111 East 60th Street
Chicago, IL 60637
(773) 702-4907

DALE MINAMI
MINAMI, LEW & TAMAKI LLP
360 Post Street, 8th Floor
San Francisco, CA 94108

ERIC K. YAMAMOTO
2515 Dole Street
Honolulu, HI 96822

STEPHEN J. SCHULHOFER
Counsel of Record
BRENNAN CENTER FOR JUSTICE
161 Avenue of the Americas
New York, NY 10013
(212) 998-6260

EVAN R. CHESLER
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

January 14, 2004

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INTEREST OF AMICUS CURIAE[1]

More than sixty years ago, as a young man, Fred Korematsu challenged the constitutionality of President Franklin Roosevelt's 1942 Executive Order that authorized the internment of all persons of Japanese ancestry on the West Coast of the United States. He was convicted and sent to prison. In *Korematsu v. United States*,[2] this Court upheld his conviction, explaining that because the United States was at war, the government could constitutionally intern Mr. Korematsu, without a hearing, and without any adjudicative determination that he had done anything wrong.

More than half a century later, Fred Korematsu was awarded the Presidential Medal of Freedom, the nation's highest civilian honor, for his courage and persistence in opposing injustice. In accepting this award, Mr. Korematsu reminded the nation that "We should be vigilant to make sure this will never happen again." He has committed himself to ensuring that Americans do not forget the lessons of their own history.

Because Mr. Korematsu has a distinctive, indeed unique, perspective on the issues presented by this case, he submits this brief to assist the Court in its deliberations.

SUMMARY OF ARGUMENT

For approximately two years, Petitioners have been imprisoned incommunicado, without access to counsel and with no opportunity to contest in any forum the factual or legal basis for their confinement. Unlike Fred Korematsu, who, as a Japanese-American internee, was at least permitted

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

[2] 323 U.S. 214 (1944).

to challenge the constitutionality of his internment, Petitioners are being deprived of the most basic components of due process.

The United States Government has defended these deprivations on the technical ground that federal courts lack reviewing jurisdiction because the Government has decided to incarcerate Petitioners on a military base over which it purports to disclaim "sovereignty." But the basis for that defense – the Government's voluntary decision to incarcerate Petitioners at Guantanamo Bay, thousands of miles from any battlefield – suggests a legal strategy, not a military one.

Although certain aspects of the "war against terrorism" may be unprecedented, the challenges to constitutional liberties these cases present are similar to those the nation has encountered throughout its history. The extreme nature of the Government's position here is all too familiar as well. When viewed in its historical context, the Government's position is part of a pattern whereby the executive branch curtails civil liberties much more than necessary during wartime and seeks to insulate the basis for its actions from any judicial scrutiny. *E.g.*, *Korematsu*, *supra*. Only later are errors acknowledged and apologies made. *E.g.*, *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866) (holding that the writ of *habeas corpus* had been wrongfully suspended during the Civil War); Proclamation No. 4417, 41 Fed. Reg. 35,7741 (Feb. 19, 1976) (acknowledging wrongfulness of internment of Japanese-Americans).[3]

It is no doubt essential in some circumstances to modify ordinary safeguards to meet the exigencies of war. But history teaches that we tend to sacrifice civil liberties too

[3] As President Ford stated in his proclamation, "I call upon the American people to affirm with me this American promise – that we have learned from the tragedy of that long-ago experience forever to treasure liberty and justice for each individual American, and resolve that this kind of action shall never again be repeated." *Id.*

quickly based on claims of military necessity and national security, only to discover later that those claims were overstated from the start. Fred Korematsu's experience is but one example of many in which courts unnecessarily accepted such claims uncritically and allowed the executive branch to insulate itself from any accountability for actions restricting the most basic of liberties.

Fortunately, there are counterexamples. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court invalidated President Truman's nationalization of the steel mills during the Korean Conflict, despite the Commander-in-Chief's insistence that his actions were necessary to maintain production of essential war material. During the Vietnam War, this Court rejected a Government request to enjoin publication of the Pentagon Papers, refusing to defer to executive branch claims that publication of this top-secret document would endanger our troops in the field and undermine ongoing military operations. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

In deciding the cases now before it, this Court should follow the tradition those cases represent, not the one exemplified by *Korematsu*. To avoid repeating the mistakes of the past, this Court should reverse the decision of the District of Columbia Circuit and affirm that the United States respects fundamental constitutional and human rights – even in time of war.

ARGUMENT

Since September 11th, the United States has taken significant steps to ensure the nation's safety. It is only natural that in times of crisis our government should tighten the measures it ordinarily takes to preserve our security. But we know from long experience that the executive branch often reacts too harshly in circumstances of felt necessity and underestimates the damage to civil liberties. Typically, we

come later to regret our excesses, but for many, that recognition comes too late. The challenge is to identify excess when it occurs and to protect constitutional rights before they are compromised unnecessarily. These cases provide the Court with the opportunity to protect constitutional liberties when they matter most, rather than belatedly, years after the fact.

As Fred Korematsu's life story demonstrates, our history merits attention. Only by understanding the errors of the past can we do better in the present. Six examples illustrate the nature and magnitude of the challenge: the Alien and Sedition Acts of 1798, the suspension of *habeas corpus* during the Civil War, the prosecution of dissenters during World War I, the Red Scare of 1919-1920, the internment of 120,000 individuals of Japanese descent during World War II, and the era of loyalty oaths and McCarthyism during the Cold War.

I. THROUGHOUT ITS HISTORY, THE UNITED STATES HAS UNNECESSARILY RESTRICTED CIVIL LIBERTIES IN TIMES OF STATED MILITARY CRISIS

History teaches that, in time of war, we have often sacrificed fundamental freedoms *unnecessarily*. The executive and legislative branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and failed to consider alternative ways to protect the national security. Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored. In retrospect, it is clear that judges and justices should have scrutinized these claims more closely and done more to ensure that essential security measures did not

unnecessarily impair individual freedoms and the traditional separation of powers.

A. The Alien and Sedition Acts of 1798

In 1798, the United States found itself embroiled in a European war that then raged between France and England. A bitter political and philosophical debate divided the Federalists, who favored the English, and the Republicans, who favored the French. The Federalists were then in power, and the administration of President John Adams initiated a sweeping series of defense measures that brought the United States into a state of undeclared war with France.[4]

The Republicans opposed these measures, leading Federalists to accuse them of disloyalty. President Adams, for example, declared that the Republicans "would sink the glory of our country and prostrate her liberties at the feet of France."[5] Against this backdrop, and in a mood of patriotic fervor, the Federalists enacted the Alien and Sedition Acts of 1798.

The Alien Friends Act empowered the President to deport any non-citizen he judged to be dangerous to the peace and safety of the United States. The Act applied to citizens or subjects of nations with whom we were not in a state of declared war. The Act accorded individuals detained under the Act no right to a hearing, no right to present evidence and no right to judicial review.[6] Congressman

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[4] James Rogers Sharp, *American Politics in the Early Republic: The New Nation in Crisis* 5 (1993); Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* 195 (1975).

[5] Letter from John Adams to the Inhabitants of Arlington and Bandgate, Vermont (June 25, 1798), in 9 *The Words of John Adams* 202 (Charles Francis Adams, ed., 1954).

[6] *See* Alien Friends Act, ch. 58, 1 Stat. 570 (1798) (expired by its own terms 1800). The Alien Enemies Act, which was adopted at the same

Edward Livington aptly observed in opposition to the Act that with "no indictment; no jury; no trial; no public procedure; no statement of the accusation; no examination of the witnesses in its support; no counsel for defence; all is darkness, silence, mystery, and suspicion."[7]

The Federalists clearly could have achieved their legitimate goals in dealing with aliens without stripping them of fundamental procedural protections. Their decision to go well beyond the demands of the moment has been judged harshly by history. The Alien Friends Act expired on the final day of President Adams's term of office, and has never been renewed.

The Sedition Act of 1798 prohibited criticism of the government, the Congress or the President, with the intent to bring them into contempt or disrepute.[8] The Act was vigorously enforced, but only against supporters of the Republican Party. Prosecutions were brought against the most influential Republican newspapers and the most vocal critics of the Adams administration.[9]

The Sedition Act also expired on the last day of Adams's term of office. The new President, Thomas Jefferson, pardoned those who had been convicted under the

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time, provided that, in the case of a declared war, citizens or subjects of an enemy nation residing in the United States could be apprehended, detained and either confined or expelled at the direction of the President. This Act has remained a permanent part of American wartime policy. *See* Alien Enemies Act, ch. 66, 1 Stat. 577 (1798).

[7] 8 *Annals of Congress* 2006-11 (1798).

[8] *See* Sedition Act of 1798, ch. 73, 1 Stat. 596 (1798) (expired by its own terms 1800).

[9] *See* John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (1951); James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956).

Act, and forty years later Congress repaid all the fines.[10] The Sedition Act was a critical factor in the demise of the Federalist Party, and since that time, the Supreme Court has often reminded us that the Sedition Act of 1798 has been condemned as unconstitutional in the "court of history."[11]

B. The Civil War: The Suspension of *Habeas Corpus*

During the Civil War, the nation faced its most serious challenge. There were sharply divided loyalties, fluid military and political boundaries, and easy opportunities for espionage and sabotage. In such circumstances, and in the face of widespread and often bitter opposition to the war, the draft and the Emancipation Proclamation, President Lincoln had to balance the conflicting interests of military necessity and individual liberty.

During the course of the war, Lincoln suspended the writ of *habeas corpus* on eight separate occasions. Some of these orders were more warranted than others. The most extreme of the suspensions, which applied throughout the entire nation, declared that "all persons . . . guilty of any disloyal practice . . . shall be subject to court martial."[12] Under this authority, military officers arrested and imprisoned as many as 13,000 civilians, with no judicial proceedings and no judicial review.[13]

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[10] Cong. Globe, 26th Cong, 1st Sess. 411 (1840). *See also* H.R. Rep. No. 26-86 (1840).

[11] *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

[12] Abraham Lincoln, 5 *The Collected Works of Abraham Lincoln* 436-437 (Roy P. Basler, ed., 1956).

[13] *See* Daniel Farber, *Lincoln's Constitution* 157 (2003); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties*

In 1866, a year after the war ended, the Supreme Court ruled in *Ex parte Milligan*[14] that Lincoln had exceeded his constitutional authority, and held that the President could not constitutionally suspend the writ of *habeas corpus*, even in time of war, if the ordinary civil courts were open and functioning. The Court rejected the Government's argument that due to the war, the executive branch had the right to function as "supreme legislator, supreme judge, and supreme executive."[15]As Chief Justice Rehnquist has observed, *Milligan* "is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime."[16]

C. World War I: The Espionage Act of 1917

When the United States entered World War I, there was widespread opposition to both the war and the draft. Many citizens argued that our goal was not to "make the world safe for democracy," but to protect the investments of the wealthy, and that this cause was not worth the life of one American soldier.

President Wilson had little patience for such dissent. He warned that disloyalty "must be crushed out" of existence[17] and declared that disloyalty "was . . . not a subject on which there was room for . . . debate." Disloyal

(1991); William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (1998).

[14] 4 Wall. (71 U.S.) 2 (1866).

[15] Rehnquist, *supra*, at 121 (quoting the brief filed on behalf of the government in *Milligan*).

[16] *Id.* at 137.

[17] David M. Kennedy, *Over Here: The First World War and American Society* (1980) (quoting Woodrow Wilson's Third Annual Message to Congress).

individuals, he explained, "had sacrificed their right to civil liberties."[18]

Shortly after the United States entered the war, Congress enacted the Espionage Act of 1917.[19] Although the Act was not directed at dissent as such, aggressive federal prosecutors and compliant federal judges soon transformed the Act into a blanket prohibition of seditious utterance.[20] The Wilson administration's intent was made clear in November 1917 when Attorney General Charles Gregory, referring to war dissenters, announced: "May God have mercy on them[,] for they need expect none from an outraged people and an avenging Government."[21]

In fact, the government worked hard to create an "outraged people." Because there had been no direct attack on the United States, and no direct threat to our national security, the Wilson administration had to generate a sense of urgency and a mood of anger in order to exhort Americans to enlist, to contribute money, and to make the many sacrifices that war demands. To this end, Wilson established the Committee for Public Information (CPI), which produced a flood of inflammatory and often misleading pamphlets, news releases, speeches, editorials, and motion pictures, all

[18] Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 53 (1979) (quoting Woodrow Wilson's Third Annual Message to Congress).

[19] Espionage Act (Barbour Espionage Act), Pub. L. No. 65-24, ch. 30, 40 Stat. 217 (1917).

[20] *See* Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. Chi. L. Rev. 335 (2003); Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 Sup. Ct. Rev. 411 (2002).

[21] *All Disloyal Men Warned By Gregory*, N.Y. Times, Nov. 21, 1917, at 3.

designed to instill a hatred of all things German and to attack the loyalty of those who questioned the war.[22]

There was widespread, and completely unfounded, fear that swarms of German spies and saboteurs roamed the country. In the first month of the war, Attorney General Gregory asked loyal Americans to act as voluntary detectives and to report their suspicions directly to the Department of Justice. The results were staggering. Each day, thousands of accusations of disloyalty flooded into the Department.[23]

Adding to the furor, the CPI encouraged citizens to form voluntary associations dedicated to informing the authorities of any incidents of possible disloyalty.

By the end of the war, the excesses of these organizations began to generate negative public reaction, and the Department of Justice attempted, with little success, to restrain their operations. In a memo to all United States Attorneys, the Department noted that the "protection of loyal persons from unjust suspicion . . . is quite as important as the suppression of actual disloyalty."[24] After the war ended, Assistant Attorney General John Lord O'Brian conceded that although these organizations "did much good," they were also one of the "chief embarrassments" caused by the "war mania." Because of their excessive zeal, they "interfered with the civil rights of many people" and contributed greatly "to the oppression of innocent men." In this respect, O'Brian observed, "the systematic and indiscriminate agitation against what was claimed to be an all-pervasive system" of

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[22] *See* Harry N. Scheiber, *The Wilson Administration and Civil Liberties: 1917-1921* 16-17 (1960).

[23] Murphy, *supra*, at 94-95; Meirion Harries and Susie Harries, *The Last Days of Innocence: America at War 1917-1918* 307 (1997).

[24] Letter from Thomas W. Gregory to U.S. Attorneys, (Oct. 28, 1918), *in* U.S. Department of Justice, *Annual Report of the Attorney General of the United States for the Year 1918* 674 (1918).

disloyalty did serious damage to the American people.[25] George Creel, who had served as director of the CPI, wrote years later that the organizations which he had helped to create were "the most obnoxious of the hysteria manufacturing bodies, whose patriotism was, at the time, a thing of screams, violence and extremes."[26]

When all was said and done, Wilson, Gregory and Creel had helped foster "a divided, fearful, and intolerant nation."[27]

It was in this atmosphere of accusation and suspicion that federal judges were called upon to interpret and apply the Espionage Act of 1917.

The Government prosecuted more than 2,000 dissenters for expressing their opposition to the war or the draft. In the atmosphere of fear, hysteria and clamor, most judges were quick to mete out severe punishment – often 10 to 20 years in prison – to those deemed disloyal. The result was the suppression of all genuine debate about the merits, morality and progress of the war.[28] But even this was not enough. Less than a year after adopting the Espionage Act, Congress enacted the Sedition Act of 1918, which declared it unlawful for any person to publish any disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government, the Constitution, or the flag of the United States.[29]

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[25] Murphy, *supra*, at 127 (quoting Assistant Attorney General John Lord O'Brian).

[26] George Creel, *Rebel at Large: Recollections of Fifty Crowded Years* 196 (1947).

[27] Harries and Harries, *supra*, at 308.

[28] *See* Zechariah Chafee, Jr., *Free Speech in the United States* 52 (1941).

[29] Sedition Act of 1918, Pub. L. No. 65-150, ch. 75, 40 Stat. 553 (May 16, 1918) (repealed 1921).

The story of the Supreme Court in this era is too familiar, and too painful, to bear repeating in detail. In a series of decisions in 1919 and 1920 – most notably *Schenck*,[30] *Debs*,[31] and *Abrams*[32] – the Court consistently upheld the convictions of individuals who had agitated against the war and the draft – individuals as obscure as Mollie Steimer, a twenty-year-old Russian-Jewish émigré who had thrown anti-war leaflets written in Yiddish from a rooftop on the lower East Side of New York, and as prominent as Eugene Debs, who had received almost a million votes in 1912 as the Socialist Party candidate for President. As Harry Kalven once observed, the Court's performance was "simply wretched."[33]

In 1921, after all the dust had settled, Congress quietly repealed the Sedition Act of 1918.[34] Between 1919 and 1923, the government released from prison every individual who had been convicted under the Espionage and Sedition Acts. A decade later, President Roosevelt granted amnesty to all of these individuals, restoring their full political and civil rights. Over the next half-century, the Supreme Court overruled every one of its World War I decisions, implicitly acknowledging that the individuals who had been imprisoned for their dissent in this era had been punished for speech that should have been protected by the First Amendment.[35]

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[30] *Schenck v. United States*, 249 U.S. 47 (1919).

[31] *Debs v. United States*, 249 U.S. 211 (1919).

[32] *Abrams v. United States*, 250 U.S. 616 (1919).

[33] Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 147 (1988).

[34] Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359-60.

[35] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

D. The Red Scare: 1919-1920

The Russian Revolution generated deep anxiety in the United States. A series of violent strikes and spectacular bombings triggered the period of public paranoia that became known as the "Red Scare" of 1919-1920. Attorney General A. Mitchell Palmer announced that the bombings were an "attempt on the part of radical elements to rule the country."[36]

Palmer established the "General Intelligence Division" within the Bureau of Investigation and appointed J. Edgar Hoover to gather and coordinate information about radical activities. The GID fed the Red Scare by aggressively disseminating sensationalized and often unwarranted charges that Communists and other radicals had instigated violent strikes and race riots.[37] The GID unleashed a horde of undercover agents to infiltrate radical organizations. From November 1919 to January 1920, the GID conducted a series of raids in thirty-three cities. More than 5,000 people were arrested on suspicion of radicalism. Attorney General Palmer described the "alien filth" captured in these raids as creatures with "sly and crafty eyes … lopsided faces, sloping brows and misshapen features" with minds tainted by "cupidity, cruelty, insanity, and crime."[38] More than a thousand individuals were summarily deported.

In the spring of 1920, a group of distinguished lawyers and law professors, including Ernst Freund, Felix Frankfurter and Roscoe Pound, published a report on the activities of the Department of Justice, which carefully documented that the

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[36] Robert K. Murray, *Red Scare: A Study in National Hysteria, 1919-1920* 9 (1955) (quoting Attorney General A. Mitchell Palmer).

[37] *See* Robert J. Goldstein, *Political Repression in Modern America: From 1870 to the Present* 150 (1978).

[38] *Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others: Hearing Before the House Comm. on Rules*, 66th Cong. 27 (1920).

government had acted without legal authorization and without complying with the minimum standards of due process.[39] As the *Christian Science Monitor* observed in June 1920, "in the light of what is now known, it seems clear that what appeared to be an excess of radicalism" was met with a real "excess of suppression."[40] In 1924, Attorney General Harlan Fiske Stone ordered an end to the Bureau of Investigation's surveillance of political radicals. "A secret police," he explained, is "a menace to free government and free institutions."[41] Charles Evans Hughes summarized the Red Scare in June of 1920:

> We have seen the war powers, which are essential to the preservation of the nation in time of war, exercised broadly after the military exigency has passed . . . and we may well wonder in view of the precedents now established whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged.[42]

E. World War II: Internment

On December 7, 1941, Japan attacked Pearl Harbor. Two months later, on February 19, 1942, President Roosevelt signed Executive Order 9066, which authorized the Army to designate "military areas" from which "any or all persons

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[39] *See* Nat'l Popular Government League, *Report upon the Illegal Practices of the United States Department of Justice* (1920).

[40] Christian Science Monitor, June 25, 1920.

[41] Max Lowenthal, *The Federal Bureau of Investigation* 298 (1950) (quoting Attorney General Harlan Fiske Stone).

[42] Charles Evan Hughes, Address at Harvard Law School (June 21, 1920) *excerpted in* Chafee, *supra*, at 102.

may be excluded."[43] Although the words "Japanese" or "Japanese American" never appeared in the Order, it was understood to apply only to persons of Japanese ancestry.

Robert Jackson observed that Roosevelt "had a tendency to think in terms of right and wrong, instead of terms of legal and illegal. Because he thought that his motives were always good for the things that he wanted to do, he found difficulty in thinking that there could be legal limitations on them."[44]

Over the next eight months, 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon and Arizona. Two-thirds of these individuals were American citizens, representing almost 90% of all Japanese-Americans. No charges were brought against these individuals; there were no hearings; they did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them. Many families lost everything.

On the orders of military police, these individuals were transported to one of ten internment camps, which were located in isolated areas in wind-swept deserts or vast swamp lands. Men, women and children were placed in overcrowded rooms with no furniture other than cots. They found themselves surrounded by barbed wire and military police, and there they remained for three years.[45]

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[43] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). Congress implicitly ratified the Executive Order by providing that violation of the order of a military commander within a zone designated by the Army as a "military area" was unlawful. Act of Mar. 21, 1942, Pub. L. No. 77-503, ch. 191, 56 Stat. 173 (repealed 1976).

[44] Robert H. Jackson, *That Man: An Insider's Portrait of Franklin D. Roosevelt* 59, 68, 74 (Robert Q. Barrett, ed., 2003).

[45] *See* Comm'n on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1982); Tetsuden Kashima, *Judgment without Trial: Japanese American Imprisonment during World War II* (2003).

In *Korematsu v. United States*,[46] this Court, in a six-to-three decision, upheld the President's action, and in *Hirabayashi v. United States*,[47] this Court upheld the constitutionality of the related curfew order. In *Korematsu*, the Court offered the following explanation:

> [We] are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. . . .
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> Korematsu was not excluded from the [West Coast] because of hostility to . . . his race, [but] because . . . the military authorities . . . decided that the [] urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area]. . . . We cannot – by availing ourselves of the calm perspective of hindsight – say that these actions were unjustified.[48]

On the same day that it upheld the relocation orders, this Court imposed an important – though belated – limitation on the program. In *Ex parte Endo*,[49] this Court held that *detention* (unlike the initial order of relocation) could not be imposed on a loyal and law-abiding citizen. The Government had argued that detention to permit "a planned and orderly relocation" was essential. But this Court held that because detention touches the most sensitive of rights, "any such implied power must be narrowly confined to the precise purpose of the evacuation program."[50]

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[46] 323 U.S. 214 (1944).

[47] 320 U.S. 81 (1943).

[48] 323 U.S. at 219-20, 223-24.

[49] 323 U.S. 283 (1944).

[50] *Id.* at 296, 302.

In *Endo*, this Court recognized, "He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized."[51] Accordingly, the Court concluded, loyal, law-abiding detainees were entitled to immediate release, notwithstanding the government's claimed need to continue detaining them for the successful administration of the relocation program.

Unfortunately, the *Endo* decision was not announced until December 18, 1944 – one day after the Roosevelt administration announced that it would release the internees. The timing was no accident. There is good reason to believe that the Court intentionally delayed its decision to allow the President rather than the Court to end the internment.[52] Although Secretary of War Stimson made clear to Roosevelt in May 1944 that the internment could be ended "without danger to defense considerations," the President postponed any such decision. Roosevelt did not want to release the internees until after the 1944 presidential election because such a decision might upset voters on the West Coast. As Peter Irons has concluded, the President's "desire for partisan advantage in the 1944 elections provides the only explanation for the delay in ending internment."[53]

Many participants in the Japanese internment later reflected on their roles. Some knew at the time that internment was unconstitutional and immoral. In April 1942, Milton Eisenhower, the National Director of the War Relocation Administration, which was responsible for running the detention camps, predicted sadly that "when this

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[51] *Id.* at 302.

[52] Eric K. Yamamoto, *et al.*, *Race, Rights and Reparation: Law and the Japanese American Internment* 174-75 (2001). *See also* Peter Irons, *Justice at War* 344-45 (1983).

[53] Irons, *supra*, at 273-77.

war is over . . . we, as Americans, are going to regret the . . . injustices" we have done. Two months later, he resigned his position.[54]

Francis Biddle, who as Attorney General had vigorously (but confidentially) opposed internment, wrote in 1962 that the episode showed "the power of suggestion which a mystic cliché like 'military necessity' can exercise on human beings." Because of a "lack of independent courage and faith in American reality," the nation missed a unique opportunity to "assert the human decencies for which we were fighting."[55]

Years before he was appointed to this Court, Tom Clark served as an Assistant Attorney General responsible for criminal prosecutions arising out of violation of the internment orders.[56] Upon retiring from the Supreme Court in 1966, Justice Clark stated that "I have made a lot of mistakes in my life. . . . One is my part in the evacuation of the Japanese from California. . . . [A]s I look back on it – although at the time I argued the case – I am amazed that the Supreme Court ever approved it."[57]

On February 19, 1976, as part of the celebration of the American Bicentennial, President Gerald Ford issued Presidential Proclamation No. 4417, in which he acknowledged that, in the spirit of celebrating our history, we must recognize "our national mistakes as well as our national achievements."[58] "February 19th," he noted, "is the anniversary of a sad day in American history," for it was "on that date in 1942 . . . that Executive Order No. 9066 was

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[54] *See id.* at 72.

[55] Francis Biddle, *In Brief Authority* 212, 226 (1962).

[56] *See id.* at 216-19; Irons, *supra*, at 119.

[57] John D. Weaver, *Warren: The Man, The Court, The Era* 113 (1967).

[58] Proclamation No. 4417, 41 Fed. Reg. 35,7741 (Feb. 19, 1976).

issued."[59] President Ford observed that "[w]e now know what we should have known then" – that the evacuation and internment of these individuals was "wrong." Ford concluded by calling "upon the American people to affirm with me this American Promise – that we have learned from the tragedy of that long-ago experience" and "resolve that this kind of action shall never again be repeated."[60]

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to review the implementation of Executive Order No. 9066. The Commission was composed of former members of Congress, the Supreme Court and the Cabinet, as well as distinguished private citizens. In 1982, the Commission unanimously concluded that the factors that shaped the internment decision "were race prejudice, war hysteria and a failure of political leadership," rather than military necessity.[61]

Shortly thereafter, federal courts granted writs of *coram nobis* vacating the convictions in the *Korematsu* and *Hirabayashi* cases. The courts found that at the time of the internment decision, government officials not only knew that there was no military necessity but in fact had intentionally deceived this Court about the circumstances.[62]

In its original version, General DeWitt's Report, which was designed to justify the military orders, did not "purport to rest on any military exigency, but instead declared that because of traits peculiar to citizens of Japanese ancestry it

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[59] *Id.*

[60] *Id.*

[61] Comm'n on Wartime Relocation and Internment of Civilians, *supra*, at 8.

[62] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). *See also* Eric K. Yamamoto and Susan Kiyomi Serrano, *The Loaded Weapon*, 29 Amerasia Journal 51 (2002).

would be impossible to separate the loyal from the disloyal."[63] Yet when officials of the War Department received the original version, they directed DeWitt to excise its racist overtones and add statements of military necessity. Copies of the original version were burned. When officials of the Justice Department were preparing to brief *Hirabayashi* in the Supreme Court, they sought all materials relevant to General DeWitt's decisionmaking. The War Department did not disclose to the Department of Justice the original version of the Report.[64] Over the objections of several officials in the Department of Justice, the War Department insisted on modifying the language of the United States' brief to this Court. The compromise language ultimately presented to this Court obfuscated the military necessity issue and did not alert the Court to inaccuracies in the final version of DeWitt's Report.[65]

In vacating Fred Korematsu's forty-year-old conviction because it was the result of "manifest injustice," the court emphasized the need for both executive branch accountability and careful judicial review:

> [*Korematsu*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. . . .[66]

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[63] *Hirabayashi*, 828 F.2d at 598.

[64] *See* Irons, *supra*, at 206-18, 278-310.

[65] *Korematsu*, 584 F. Supp. at 1417-18. *See* Yamamoto, et al., *supra*, at 293-330; Irons, *supra*, at 206-18; Peter Irons, *Fancy Dancing in the Marble Palace*, 3 Const. Comment. 35, 39-41 (1986).

[66] *Korematsu*, 584 F. Supp. at 1420.

In 1988, President Reagan signed the Civil Liberties Act of 1988, which officially declared the Japanese internment a "grave injustice" that had been "carried out without adequate security reasons," and offered a formal presidential apology and reparations to each Japanese-American who had been interned along with a formal presidential apology for the discrimination, loss of liberty, loss of property and personal humiliation they had suffered.[67]

This Court's decision in *Korematsu* has become a constitutional pariah. This Court has never cited it with approval of its result.[68]

F. The Cold War: Loyalty Oaths and McCarthyism

As World War II drew to a close, the nation moved almost seamlessly into the Cold War. With the glow of our wartime alliance with the Soviet Union evaporating, President Truman came under increasing attack by those who sought to exploit fears of Communist aggression. The issue of "loyalty" quickly became a shuttlecock of party politics. By 1948, President Truman was boasting on the stump that he had imposed on the federal civil service the most extreme loyalty program in the "Free World."[69]

But there were limits to Truman's anti-communism. In 1950, he vetoed the McCarran Act, which required the registration of all Communists. Truman's Attorney General

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[67] Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).

[68] *See* Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 Sup. Ct. Rev. 455, 485 at n. 99 (2002).

[69] *See* David Caute, *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* 15-33 (1978).

labeled the Act a product of public "hysteria."[70] Truman argued that the "internal security of the United States is not seriously menaced by the communists in this country," whom he termed a "noisy but small and universally despised group." He charged that those who claimed that the nation was in peril from domestic subversion had "lost all proportion, all sense of restraint, all sense of patriotic decency."[71] Yet Congress passed the Act over Truman's veto.[72]

In 1954, Congress enacted the Communist Control Act,[73] which stripped the Communist Party of "all rights, privileges, and immunities." Only one Senator, Estes Kefauver, dared to vote against it. Irving Howe lamented "this Congressional stampede to . . . trample . . . liberty in the name of destroying its enemy."[74]

Hysteria over the "Red Menace" swept the nation and generated a wide range of federal, state and local restrictions on free expression and free association, including extensive loyalty programs for government employees; emergency detention plans for alleged "subversives"; abusive legislative investigations designed to punish by exposure; public and private blacklists of those who had been "exposed"; and

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[70] C.P. Trussell, *Congress Passes Bill to Curb Reds By Heavy Margins*, N.Y. Times, Sept. 21, 1950, at 1 (quoting Attorney General J. Howard McGrath).

[71] Robert Griffith, *The Politics of Fear* 88-89 (1970); President Harry S. Truman, Address in Kiel Auditorium, St. Louis (Nov. 4, 1950); Lowenthal, *supra*, at 450-51; Goldstein, *supra*, at 328.

[72] Internal Security (McCarran) Act of 1950, Pub. L. No. 81-831, ch. 1024, 64 Stat. 987 (1950).

[73] Communist Control Act of 1954, Pub. L. No. 83-886, ch. 886, 68 Stat. 775 (1954).

[74] Irving Howe, *The Shame of U.S. Liberalism,* 1 Dissent 308 (Autumn, 1954).

criminal prosecutions of the leaders and members of the Communist Party of the United States.[75]

This Court's response was mixed. The key decision was *Dennis v. United States*,[76] which involved the direct prosecution under the Smith Act of the leaders of the American Communist Party. The Court held that the defendants could constitutionally be punished for their speech under the clear and present danger standard – even though the danger was neither clear nor present. It was a memorable feat of judicial legerdemain.[77]

Over the next several years, the Court upheld far-reaching legislative investigations of "subversive" organizations and individuals and the exclusion of members of the Communist Party from the bar, the ballot and public employment.[78] In so doing, the Court clearly put its stamp of approval on an array of actions we look back on today as models of McCarthyism. In later years, the Court effectively overruled *Dennis* and its progeny, recognizing once again that the nation had been led astray by the emotions and fears of the moment.[79]

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[75] *See generally* Ralph S. Brown, *Loyalty and Security* (1958); Caute, *supra*; Frank Donner, *The Age of Surveillance: The Aims and Methods of America's Political Intelligence System* (1980); Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (1978).

[76] 341 U.S. 494 (1951).

[77] *See* Kalven, *supra*, at 211; William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 Sup. Ct. Rev. 375 (2001).

[78] *See, e.g, Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Adler v. Bd. of Educ. of New York*, 342 U.S. 485 (1952); *Barenblatt v. United States*, 360 U.S. 109 (1959).

[79] *See, e.g., Yates v. United States*, 354 U.S. 298 (1957) (narrowly construing the Smith Act); *Brandenburg v. Ohio*, 395 U.S. 444 (1969)

II. ASSERTIONS OF EXECUTIVE PREROGATIVE AND MILITARY NECESSITY SHOULD BE SCRUTINIZED CLOSELY TO AVOID YET ANOTHER MISTAKEN AND UNNECESSARILY RESTRICTIVE CURTAILMENT OF CIVIL LIBERTIES

As in the past, the issues these cases raise involve a direct conflict between our civil liberties and a threat to our safety and security. That we have made mistakes in the past does not mean we should make another, perhaps more serious mistake now. We should learn from our experience.

During World War I, John Lord O'Brian served as Special Assistant Attorney General in charge of the War Emergency Division of the Department of Justice. In this capacity, he played a central role in enforcing the Espionage Act of 1917. Four decades later, reflecting on his own experience, O'Brian cautioned against the "emotional excitement engendered . . . during a war," and warned that "the greatest danger to our institutions" may rest, not in the threat of subversion, but "in our own weaknesses in yielding" to wartime anxiety and our "readiness to . . . disregard the fundamental rights of the individual." He expressed the hope that "our judges will in the end establish principles reaffirming" our nation's commitment to civil liberties.[80]

As Chief Justice Rehnquist has written, "[i]t is all too easy to slide from a case of genuine military necessity . . . to one where the threat is not critical and the power [sought to be exercised is] either dubious or nonexistent."[81] It is, he

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(rejecting the *Dennis* version of clear and present danger); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (holding unconstitutional anti-Communist loyalty oath for public employees).

[80] John Lord O'Brian, *New Encroachments on Individual Freedom*, 66 Harv. L. Rev. 1, 3, 26 (1952). *See also* John Lord O'Brian, *Changing Attitudes Toward Freedom*, 9 Wash. & Lee L. Rev. 157 (1952).

[81] Rehnquist, *supra*, at 224.

added, "both desirable and likely that more careful attention will be paid by the courts to the . . . government's claims of necessity as a basis for curtailing civil liberty."[82]

This Court has a profound responsibility to help guide our nation in the extraordinary circumstances of wartime. It has been said that in such circumstances the Court may grant too much deference to the other branches of government to avoid inadvertently hindering the war effort.[83] *Korematsu* and *Dennis* are examples of this phenomenon.

But the lesson of those decisions is not that this Court should abdicate its responsibility. It is, rather, that the Court should bring to its responsibility an even deeper commitment to preserving the liberties for which this nation has fought. The Court's confident exercise of that responsibility is essential to enabling our nation to strike the *right* balance in times of crisis.

This Court has often demonstrated that commitment, seeking – *even in the midst of war* – to restrain the tendency to compromise essential liberties. The *Endo* decision, *supra*, holding that the interminent camps for Japanese-Americans were illegal, was reached in 1944, while the Second World War was still being fought (though it was issued a day after the President announced his intention to close the camps). In *Schneiderman v. United States*,[84] and *Baumgartner v. United States*,[85] the Court held, over strong executive branch objections, that the United States could not constitutionally denaturalize an individual for speech or association unless it could prove by clear and convincing evidence that the individual had personally endorsed "present violent action which creates a clear and present danger of public disorder or

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[82] *Id.* at 225.

[83] *See id.* at 222.

[84] 320 U.S. 118 (1943).

[85] 322 U.S. 665 (1944).

other substantive evil."[86] *Schneiderman* and *Baumgartner* effectively ended the government's campaign during World War II to denaturalize former members of the German-American Bund and the Communist Party.

During the Korean conflict, this Court invalidated the President's seizure of steel mills, reasoning that the seizure, though based on an asserted need to maintain production of essential war materials, was not authorized by Congress or the Constitution.[87] In *United States v. Robel*,[88] this Court held unconstitutional a provision of the Subversive Activities Control Act of 1950 that prohibited members of any "Communist-action" organization from working "in any defense facility." The Court held that even in the context of defense facilities, and even at the height of the Cold War, the government must achieve its goals with carefully drawn regulations and with a due regard for First Amendment freedoms. And during the Vietnam War, this Court refused to stop publication of the top-secret "Pentagon Papers," despite executive branch claims that publication would endanger our troops in the field.[89]

Even more common are the instances when, after hostilities have ended, the courts have condemned wartime infringements of liberty and due process. As noted above, following the Civil War, this Court in *Milligan* held that the President had exceeded his authority by suspending the writ of habeas corpus when the civil courts were open and functioning.[90] During World War I and the 1919-1920 Red Scare, the Court allowed the rights of "agitators" to be

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[86] *Schneiderman*, 320 U.S. at 157-159.

[87] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[88] 389 U.S. 258 (1967).

[89] *New York Times Co. v. United States*, 403 U.S. 713 (1971).

[90] 71 U.S. 2 (1866).

severely restricted,[91] but thereafter recognized existing protections for political speech and activities in support of unpopular causes.[92] In the wake of World War II, this Court upheld the issuance of writs of *habeas corpus* to release two individuals who had been detained and convicted during the war under a regime of martial law imposed in Hawaii.[93] The Court in that case reasoned that "[c]ourts and their procedural safeguards are indispensable to our system of government," and it held that even with Congress's *express* approval of "martial law" in the islands, the executive branch had exceeded its authority when it supplanted Hawaiian courts with military tribunals.[94] The period following the McCarthy Era (although not technically the aftermath of a war) was similarly characterized by court decisions protecting liberties that had been infringed during that era.[95]

Of course, in this case, the Government would not allow even for these post-war judicial "corrections" because the Government would not permit any review of its decision to detain the Petitioners indefinitely. This vision of the executive branch's authority is inconsistent with our constitutional commitment to a government of laws.

Let us not now set the foundation for later apologies and belated attempts to restore narrowed rights. Let us instead underscore the role of the courts in assuring the indispensable safeguards by which we are, and should be, measured as a just society.

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[91] *See supra*, notes 30-33 and accompanying text.

[92] *See Herndon v. Lowry*, 301 U.S. 242 (1937) (overturning, because of lack of evidence of incitement, the conviction of a Communist Party member).

[93] *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

[94] *Id.* at 322-23.

[95] *See supra*, note 79 and accompanying text.

This Court should make clear that even in wartime, the United States respects the principle that individuals may not be deprived of their liberty except for appropriate justifications that are demonstrated in fair hearings, in which they can be tested with the assistance of counsel. This Court should make clear that the United States does not constrict fundamental liberties in the absence of convincing military necessity. And even when such necessity is established, liberties can be restricted only while preserving some avenue for review comporting with the minimum required by due process.

Our failure to hold ourselves to this standard in the past has led to many of our most painful episodes as a nation. We should not make that mistake again.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

Geoffrey R. Stone
Stephen J. Schulhofer*
Evan R. Chesler
Dale Minami
Eric Yamamoto
Attorneys for amicus curiae Fred Korematsu

**Counsel of record*

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

(23) (23)

Nos. 03-334, 03-343

In the Supreme Court of the United States

SHAFIQ RASUL, ET AL.,
Petitioners,
v.
GEORGE W. BUSH, ET AL.,
Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Petitioners,
v.
UNITED STATES, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF RETIRED MILITARY OFFICERS IN SUPPORT OF PETITIONERS

MIRNA ADJAMI
Midwest Immigrant and Human Rights Center
208 South LaSalle St.
Chicago, IL 60603
(312) 660-1330

JAMES C. SCHROEDER
Counsel of Record
GARY A. ISAAC
STEPHEN J. KANE
JON M. JUENGER
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle St.
Chicago, IL 60603
(312) 782-0600

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are three retired military officers. Each one formerly served as the Judge Advocate General or the senior legal advisor for a branch of the United States military, and has extensive experience with U.S. military regulations and the Laws of War. Each dedicated his military career to the principle that the mission of the nation's Armed Forces must be consistent with the rule of law.

The principal purpose of this brief is to explain to the Court the profound ramifications, from a military point of view, of the government's position that no court can decide whether foreign prisoners at the United States Naval Base at Guantanamo Bay, Cuba may be held there without any charges being brought against them and without being afforded a hearing by a "competent tribunal" to determine their status, as required by U.S. military regulations and the Geneva Conventions of 1949. Amici are concerned that foreigners capturing American forces in current or future conflicts will use the failure of the United States to follow the competent tribunal requirement in the Geneva Conventions at Guantanamo as justification for refusing to apply the Geneva Conventions to American captives.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Headquarters Marine Corps, and in that capacity, he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the amici curiae has made a monetary contribution to the preparation and submission of this brief.

was the senior legal advisor for the Marine Corps from 1985 through 1988, when he retired from the military. General Brahms is currently in private practice in Carlsbad, California and is a member of the Board of Directors of the Judge Advocates Association. He also served as the Technical Advisor for the film *A Few Good Men*.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After a break for law school, he returned to the Navy in 1977 and remained in the Navy until 2002, when he retired from the military. He served as the Navy's Judge Advocate General from June 2000 through June 2002. Rear Admiral Guter was in the Pentagon when it was attacked by terrorists on September 11, 2001.

Rear Admiral John D. Hutson served in the United States Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. He is presently the Dean and President of the Franklin Pierce Law Center in Concord, New Hampshire.

SUMMARY OF ARGUMENT

For more than 200 years, the United States has been at the forefront of international efforts to codify and safeguard the rights of prisoners captured in wartime. Those efforts resulted, after World War II, in the Geneva Conventions of 1949, which the Senate ratified in 1955. Key provisions of those Conventions have been incorporated in American military regulations, including the requirement that the status of captured persons must be determined by a competent tribunal if there is any doubt that the captives are prisoners of war to whom the protections of the Geneva Conventions apply.

The requirement that prisoners' status be determined by a competent tribunal comports with the fundamental principle that the Constitution established a government of limited powers. The government should not be permitted, through

Executive fiat, to imprison persons indefinitely when no charges have been brought against them and the prisoners are barred from all access to courts and other tribunals to determine their status.

The government's contention is that no court anywhere on earth has jurisdiction even to entertain the Guantanamo prisoners' claims—that the federal courts could not intervene even if prisoners there were being executed or tortured. The government's position is based on the proposition that only Cuba, not the United States, has sovereignty over the base. But under the governing agreements with Cuba—which afford the United States "complete jurisdiction and control" over the base in perpetuity—the United States exercises, at a minimum, some sovereign powers over the base. Military officials have long regarded the lease, executed in 1903, as providing that Cuban sovereignty is interrupted while the lease remains in force; Cuba has only residual sovereignty. In the meantime, the United States acts as the "pro tanto sovereign" of the base, as the State Department's Office of the Solicitor concluded in 1912. Scholars have agreed that the United States exercises at least some sovereign powers at Guantanamo.

Applying the rule of law to the Guantanamo prisoners is especially important to the members of the United States Armed Forces. American troops are dispatched regularly on a wide variety of missions around the globe. If any of them are captured, our government will undoubtedly insist that they be treated in accordance with the principles of the Geneva Conventions. But if the United States refuses to apply the competent tribunal requirement in the Geneva Conventions to the prisoners being held at Guantanamo, it increases the likelihood that foreign authorities holding American captives will decide to ignore the Geneva Conventions entirely —thereby putting the lives of American prisoners at risk.

ARGUMENT

I. The United States Has Played A Leading Role In Developing International Standards To Safeguard The Rights Of Captured Prisoners.

The United States has long "been a leader in the development of th[e] trend * * * of bettering the humanitarian principles invoked in the treatment of prisoners of war." Gen. J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 MIAMI L.Q. 40, 41 (1950). A 1785 treaty between the United States and Prussia "probably constituted the first international attempt to provide in time of peace for the protection of prisoners of war." Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 5-6 (1977). In 1863, Abraham Lincoln commissioned Dr. Francis Lieber to draft a code of conduct for the Union army in treating prisoners of war. *Id.* at 7. The Lieber Code, as it came to be known, "was perhaps the first formal codification of rules governing the treatment to be accorded prisoners of war," Dillon, 5 MIAMI L.Q. at 42, and it "had a significant influence on the attitude of nations and on the subsequent Hague Conventions of 1899 and 1907," *ibid.*, which were "the first effective multilateral codification[s] of the law of war," Levie, PRISONERS OF WAR, at 8. After World War I, the United States and Germany entered into an agreement concerning the treatment of prisoners of war. Dillon, 5 MIAMI L.Q. at 42. The subsequent 1929 Geneva Convention Relative to the Treatment of Prisoners of War, signed by the United States and more than 40 other nations, bore "a striking resemblance to the United States-German agreement." *Id.* at 43.

The Geneva Convention of 1929 played a significant role during World War II. Scholars have concluded that "'the fact that millions of prisoners of war from all camps, notwithstanding the holocaust, did return, is due exclusively

to the observance of the Geneva Prisoners of War Convention.'" Levie, PRISONERS OF WAR, at 10 n.44. "The American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany during World War II to compliance with the 1929 Convention." *Ibid.*

But the treatment of prisoners of war during World War II also indicated that the Geneva Convention of 1929 required substantial revision to broaden and clarify the circumstances under which its protections would apply. *Id.* at 10-11. Some countries had argued that the 1929 Convention did not apply to protect prisoners when the invading country had not formally declared war; Germany had claimed that the 1929 Convention did not apply to Polish prisoners because the Polish government ceased to exist; and Germany had contended as well that the 1929 Convention did not apply to French prisoners because France ceased to be a belligerent after signing an armistice with Germany. *Id.* at 11-12.

Following World War II, an American general suggested to the President of the International Committee of the Red Cross ("ICRC") that "a meeting of experts on prisoner of war affairs of the various belligerent nations be called with the view of recording for future reference, their experiences under the Convention of 1929." Dillon, 5 MIAMI L.Q. at 43. The ICRC agreed, and sent invitations "to all of the belligerents of World War II." *Ibid.* The United States went on to play "a major role both in the prepatory steps and in the conference proceedings." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Committee on Foreign Relations*, 84th Cong., 1st Sess., at 3-4 (1955) ("Senate Hearing") (statement of Robert Murphy, Deputy Under Secretary of State). A series of meetings involving the United States and other nations resulted in the four Geneva Conventions of 1949, including the Geneva Convention

Relative to the Treatment of Prisoners of War. Dillon, 5 MIAMI L.Q. at 43.

The Senate debate on ratification of the 1949 Conventions suggests that two basic principles animated the Senate's eventual decision to ratify. First, there was a belief that it was critical for the United States to lend its moral authority to the Conventions and to provide a model for other nations to follow in treating prisoners of war. In urging Senate approval, Secretary of State John Foster Dulles stated that American "participation is needed to enlist the authority of the United States in the[] interpretation and enforcement" of the Conventions. Senate Hearing at 61. Secretary Dulles went on to express the view that "United States ratification of the Geneva Conventions, by lending further support to their standards, should influence favorably future behavior toward prisoners of war." *Id.* at 68.

Second, by treating prisoners of war in accordance with the 1949 Conventions, the United States believed that it would encourage its enemies to reciprocate in their treatment of American prisoners of war. Deputy Under Secretary of State Murphy informed the Senate Committee on Foreign Relations that although neither North Korea nor the United States had ratified the 1949 Conventions at the time of the Korean War, "the moral acceptance of the conventions as a general norm did have some effect on" North Korea's treatment of American prisoners of war during the war. *Id.* at 5. Looking to the potential for future conflicts, Secretary Dulles explained that American "participation is needed to * * * enable us to invoke them for the protection of our nationals." *Id.* at 61. Similarly, Senator Mike Mansfield stated that "it is to the interest of the United States that the principles of these conventions be accepted universally by all nations." 101 Cong. Rec. 9960 (July 6, 1955). Senator Mansfield explained that American "standards are already high. The conventions point the way to other governments. Without any real cost to

us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people as compared with what had been their previous treatment." *Ibid.* Senator Alexander Smith concurred: "I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is our own United States. * * * To the extent that we can obtain a worldwide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment." *Id.* at 9962.

II. The Geneva Conventions And U.S. Military Regulations Implementing The Conventions Require That A Competent Tribunal Determine The Status Of Captured Prisoners.

The second paragraph of Article 5 of the Third Geneva Convention of 1949 provides:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining POWs], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.

The same requirement has been adopted in American military regulations:

> All persons taken into custody by U.S. forces will be provided with the protections of the GPW [1949 Geneva Convention on Prisoners of War] until some other legal status is determined by competent authority.

United States Dep't of Army, Regulation 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees," § 1-5(a)(2) (Oct. 1, 1997).[2] The regulation further provides (*id.* § 1-6):

> (a) In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated under Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.
>
> (b) A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

The United States "has in the past interpreted [Article 5] as requiring an individual assessment of status before privileges can be denied. Any individual who claims POW status is entitled to an adjudication of that status." Jennifer Elsea, *Treatment of "Battlefield Detainees" in the War on Terrorism*, CRS REPORT FOR CONGRESS 29 (Apr. 11, 2002). See also Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER F. WORLD AFF. 55, 65 (Fall 2003) (Article 5 requires "individualized determinations"); Constitution Project, RECOMMENDATIONS FOR THE USE OF MILITARY

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[2] Regulations for the other branches of the military contain the same provisions discussed in the text. See OPNAVINST 3461.6 (Navy); AFJI 31-304 (Air Force); MCO 3461.1 (Marine Corps).

COMMISSIONS 3 (Sept. 18, 2002) ("all captives asserting POW status should be granted the individualized determinations envisaged by Army regulations").

Moreover, it is Department of Defense policy to comply with the Laws of War, including the Geneva Conventions, "in the conduct of military operations and related activities in armed conflict, *however such conflicts are characterized.*" Judge Advocate General's School, OPERATIONAL LAW HANDBOOK 10 (O'Brien, ed. 2003) (emphasis added); see also Department of Defense Directive No. 5100.77, ¶ 5.3.1 (Dec. 9, 1998). Thus, the military instructs its Judge Advocates that they "should advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status may be determined." OPERATIONAL LAW HANDBOOK at 22. See also U.S. Marine Corps, The Basic School Training Command, LAW OF WAR/CODE OF CONDUCT 10 (Dec. 2002) (instructing Marine Corps cadets that "[e]veryone who is captured or detained during a conflict should therefore be treated as the Geneva POW Convention requires until the proper tribunal can judge his or her case").

III. The Judicial Branch Has A Duty To Act As A Check On The Executive Branch, Even In Wartime.

In times of war, this Court has deferred to a considerable extent—and properly so—to the military and to the Executive Branch. But this case poses an issue that this Court has never decided: whether American courts have jurisdiction to consider the claims of foreigners captured by American forces, who are imprisoned indefinitely, without charges, based simply on the government's say-so, and who have been denied access to any court or "competent tribunal" to determine their status.

The D.C. Circuit's answer was that the courts have no role; the Executive Branch's indefinite imprisonment of

petitioners cannot be challenged in any court or tribunal. But complete judicial deference on this point is at odds with the specific military regulations already discussed. It is irreconcilable, too, with the limited government that the Founding Fathers adopted.

The Constitution was designed to "guard[] the foundations of civil liberty against the abuses of unlimited power." *Ex parte Milligan*, 71 U.S. 2, 126 (1866). The Constitution must impose some limits on the authority of government officials to pronounce that detainees may be held indefinitely, without being charged and without any sort of hearing or judicial process. "Such a practice, once established with the best of intentions, will drift into oppression * * * in this country as surely as it has elsewhere." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 226 (1953) (Jackson, J., dissenting). "[D]ifferences in the process of administration make all the difference between a reign of terror and one of law." *Ibid.* Thus, although the courts "must accord great respect and consideration to the judgments of the military authorities," it is "essential that there be definite limits to military discretion." *Korematsu* v. *United States*, 323 U.S. 214, 233-234 (1944) (Murphy, J., dissenting). See also *Shaughnessy*, 345 U.S. at 218 (Black, J., dissenting) (no "governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice").

To be sure, this is a perilous time, as the President has stated. But that does not justify indefinite confinement without any type of hearing or judicial review. Indeed, during previous wars, the United States has conducted Article 5 hearings to determine whether captured persons should be accorded POW status under the Geneva Conventions. Department of Defense, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 578 (1992) (1,196 Article 5 hearings were conducted during the 1991 Gulf War; 886 persons were found to be civilians); *Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT'L. L. 754, 768-775 (1968) (hearings during the Vietnam war). And as of May 2003, the military had held "50 to 100" Article 5 hearings to determine the status of detainees in the 2003 Iraq War. Department of Defense, *Briefing on Enemy Prisoner of War Status Categories, Releases and Paroles* (May 9, 2003); see also Department of Defense News Briefing (Apr. 7, 2003) (the United States treated all detainees during the 2003 Iraq War as prisoners of war before holding Article 5 tribunals).

Nor do the September 11 attacks and the ensuing war on terrorism mean that courts may abdicate their vital role in our constitutional system of checks and balances. As Benjamin Franklin cautioned long ago, "[t]hose who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety." Benjamin Franklin, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA, title page (1759) (Arno Press reprint 1972). This Court has made clear that "the duty * * * rests on the courts, *in time of war as well as in time of peace*, to preserve unimpaired the constitutional safeguards of civil liberty." *Ex parte Quirin*, 317 U.S. 1, 19 (1942) (emphasis added). "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government." *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality opinion). In fact, this Court heard and decided *Quirin* in the summer of 1942, only eight months after the Japanese attack on Pearl Harbor, when the outcome of the Second World War was still very much in doubt. See also *Sterling* v. *Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in

a particular case, are judicial questions"); *Milligan*, 71 U.S. at 121 (the "pernicious" idea that a Constitutional provision "can be suspended during any of the great exigencies of government * * * leads directly to anarchy or despotism"); *Brown* v. *United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting) (although the President in wartime "has a discretion vested in him * * * he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims"). If courts do not "abide by the Constitution" in wartime, "they cease to be civil courts and become instruments of military policy." *Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting).

Furthermore, "'[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. * * * The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.'" *Chandler* v. *Miller*, 520 U.S. 305, 322 (1997) (quoting *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)). Even assuming that the government now is acting out of the best of intentions, this Court has cautioned that "[t]his nation * * * has no right to expect that it will always have wise and humane rulers * * *. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln." *Milligan*, 71 U.S. at 125. If that ever happens, the "dangers to human liberty" from total judicial deference to the Executive Branch "are frightful to contemplate." *Ibid.* A successful conclusion to the war on terror "will have been in vain" if "we discover that in the process we have destroyed the very freedoms for which we fought." *Estep* v. *United States*, 327 U.S. 114, 132 (1946) (Murphy, J., concurring).

IV. Under The Unique 1903 Lease With Cuba, The United States Exercises At Least Some Sovereign Powers Over The Guantanamo Base.

The government argues that the foregoing principles do not apply to the Guantanamo prisoners—that federal courts have no jurisdiction at all even to consider any claims concerning the detainees' indefinite imprisonment—because the "jurisdictional rule" supposedly established by *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), "is based on sovereignty," and "the Guantanamo detainees are being held outside the sovereign territory of the United States." Br. Opp. 15. The government's argument that the United States exercises no sovereign powers over Guantanamo rests on Article III of the February 1903 lease agreement between the United States and Cuba, which provides as follows:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by the exercise of eminent domain with full compensation to the owners thereof.

T.S. No. 418, Art. III, 6 Charles I. Bevans, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 1113, 1114 (State Dep't 1971). Because the lease reserves to Cuba "'ultimate sovereignty' over the naval base" (Br. Opp. 16), the government asserts,

the United States exercises no sovereign powers at the base and, under *Eisentrager*, the people imprisoned at Guantanamo are beyond the reach of any court, including this Court—even though the United States has had "complete jurisdiction and control," T.S. No. 418, Art. III, over the base for more than a century. Indeed, the government apparently has acknowledged "that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees." *Gherebi* v. *Bush*, 2003 WL 22971053, at *13 (9th Cir. Dec. 18, 2003).

We agree with petitioners (Rasul Pet. 19-20) that the government incorrectly focuses on the technical issue of "sovereignty," and that *Eisentrager* authorizes habeas relief where the United States enjoys "territorial jurisdiction," *Eisentrager*, 339 U.S. at 768, 771, 778, 781, as the United States indisputably does at Guantanamo under the express terms of Article III of the 1903 lease. But the government's position is flawed for reasons that go beyond that.

1. The Guantanamo lease is unique. For one thing, the lease is perpetual—the United States can keep the base as long as it likes. The original lease, for "coaling or naval stations," was not subject to any time limitation, T.S. No. 418, and a 1934 treaty with Cuba confirms that the United States may retain the base forever if it wishes: it provides that the lease remains in force "[s]o long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits." T.S. No. 866, Art. III, 6 Bevans at 1161, 1162.

To our knowlege, Guantanamo is the only military base located in another country that the United States is legally entitled to keep in perpetuity. Every other American base overseas is leased for a specific term, and when that term expires, either the base must be closed or the agreement

renegotiated—a process in which the host countries may seek a variety of diplomatic, political and economic concessions in exchange for continued American use of the base. See Robert E. Harkavy, GREAT POWER COMPETITION FOR OVERSEAS BASES 3, 5, 206-209 (1982). That type of "bargained diplomatic exchange" (*id.* at 5) is entirely absent with Guantanamo—the United States may stay at Guantanamo as long as it desires. Cuba has no say in the matter whatsoever. The Castro government has long objected to the base, but the United States has remained.

2. In addition, the government's current interpretation of Article III of the 1903 lease—and of the "ultimate sovereignty" provision in particular—is fundamentally at odds with the interpretation that has long held sway among those within the U.S. military charged with responsibility for Guantanamo and for the negotiation and administration of other base leases.

The most striking evidence of this is found in a history of the Guantanamo Naval Station written in 1953—long before this dispute arose—by Rear Admiral Marion E. Murphy, the Commander at Guantanamo at the time. Marion E. Murphy, THE HISTORY OF GUANTANAMO BAY (1953). Rear Admiral Murphy's history was published by the Navy and is posted to this day on the official U.S. Navy web site (www.nsgtmo.navy.mil/history.htm), which describes the history as a "monumental work," although it adds a disclaimer that the history is not "presented as 'official documentation' * * * by the United States Government or its agencies."

Admiral Murphy's understanding of the lease's "ultimate sovereignty" provision could not have been clearer:

> "Ultimate," meaning final or eventual, is a key word here. *It is interpreted that Cuban sovereignty is interrupted during the period of our occupancy, since we exercise complete jurisdiction and control*, but in

> case occupation were terminated, the area would revert to the ultimate sovereignty of Cuba.

HISTORY OF GUANTANAMO BAY at 6 (emphasis added). Thus, Rear Admiral Murphy explained,

> it is clear that at Guantanamo Bay we have a Naval reservation which, for all practical purposes, is American territory. Under the foregoing agreements, *the United States has for approximately fifty years exercised the essential elements of sovereignty over this territory*, without actually owning it.

Id. at 7 (emphasis added). Moreover, "[u]nless we abandon the area or agree to a modification of the terms of our occupancy, we can continue in the present status as long as we like." *Id.* at 7-8.

The same practical understanding of the lease is reflected in an analysis published in 1961 by Rear Admiral Robert D. Powers, Jr., then Deputy and Assistant Judge Advocate General of the Navy. *Caribbean Leased Bases Jurisdiction*, 15 JAG J. 161 (Oct.-Nov. 1961).[3] Rear Admiral Powers began by observing that in marked contrast to other American military bases, which "have been leased for a finite term with fixed provisions as to use and jurisdiction," the "bases at Guantanamo Bay in Cuba and the Canal Zone in Panama are unique in their grants of jurisdiction and their indefinite terms of occupancy." *Id.* at 161. Rear Admiral Powers went on to explain:

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[3] As a Navy lawyer, Rear Admiral Powers was directly involved in negotiating and administering base leases, serving, for example, as the legal adviser to the U.S. Negotiating Group in connection with obtaining base rights through agreements with other countries. 15 JAG J. at 161 n.*.

> IT MAY BE said that the words used regarding sovereignty in the two treaties [concerning Guantanamo and the Panama Canal Zone] grant to the United States the complete right in each case to act as the sovereign, with titular or residual sovereignty in the grantor nation. * * * *If merely ultimate sovereignty is recognized by both parties as remaining in Cuba, then the exercise of present or actual sovereignty must be vested in the United States.*

Id. at 163 (emphasis added). While acknowledging "that *all* the rights of sovereignty" might "not pass" to the United States given the lease's recognition of Cuba's "*ultimate* sovereignty," *ibid.*, Rear Admiral Powers recognized that Cuba retained "at most a 'titular' sovereignty," *id.* at 166, a concept that William Howard Taft, as Secretary of War, characterized as "'a barren ideality,'" *id.* at 164. Like the original Panama Canal treaty, the Guantanamo lease provided the United States with a "complete grant of jurisdiction and control, with only a possibility of reversionary or residual jurisdiction in the grantor." *Id.* at 163. The United States thus is "entitled to treat the territory as subject to such laws and administration as it may make applicable." *Id.* at 166.[4]

3. The conclusion that the United States exercises at least some sovereign powers at Guantanamo is found as well in a 54-page Memorandum prepared in 1912 by the State Department's Office of the Solicitor in connection with negotiations then ongoing between the United States and Cuba

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[4] Similarly, the majority in *Gherebi* concluded that as long as the United States retains the Guantanamo base, it "possesses and exercises all of the attributes of sovereignty, while Cuba retains only a residual or reversionary sovereignty interest." 2003 WL 22971053, at *7. Both the majority and dissent recognized that sovereignty can be shared or partial. *Id.* at *9 n.17, *20 n.4.

to extend the boundaries of the Guantanamo base. After reviewing the negotiating history leading up to the 1903 lease, as well as the provision in the lease affording the United States the power of eminent domain, the Solicitor concluded: "[i]t would thus appear that this Government, upon the approval of this Agreement [the 1903 lease] by Cuba, might well have gone into possession immediately and, as *pro tanto sovereign*, have appropriated under the right of eminent domain the private land found within the leased areas." May 7, 1912 Memorandum, at 4 (emphasis added), National Archives, Record Group 59, document no. 811.34537/95. In short, "the Cuban Government is furnishing to this Government the naval reservation and is giving to this Government the *quasi-sovereign rights* granted without any compensation other than the payment of this nominal rent." *Id.* at 10 (emphasis added).

4. Scholars likewise have concluded that the terms of the 1903 lease provide the United States with some type of sovereignty over Guantanamo. Some have concluded that the United States has "territorial sovereignty" over Guantanamo as a result of the lease. See William W. Bishop, Jr., INTERNATIONAL LAW: CASES AND MATERIALS 300 (1953) (noting that "[a]t times one state has acquired by lease rights corresponding more or less closely to territorial sovereignty over parts of the territory of another state," and citing the Guantanamo lease as an example); Robert L. Montague, III, *A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem*, 50 KY. L.J. 459, 488 (1962) ("the rights conferred upon the United States under this lease amount to 'territorial sovereignty'").

Other scholars agree with Rear Admiral Murphy's view that Cuba's "ultimate" sovereignty over the base means "eventual" sovereignty, *i.e.*, reversionary sovereignty that will become effective only if the United States decides to relinquish the base. See Martin J. Scheina, *The U.S. Presence in Guantanamo*, 4 STRATEGIC REVIEW 81, 82 (Spring 1976)

(the lease "recognized Cuba's continuance of ultimate (final or eventual) sovereignty"); Joseph Lazar, *International Legal Status of Guantanamo Bay*, 62 AM. J. INT'L L. 730, 735, 740 (1968) (Article III of the 1903 lease "is an express recognition by the parties that Cuban sovereignty over the leased areas rests suspended"; "Cuba has not yet been given the 'ultimate sovereignty' over Guantanamo"); Mary Ellene Chenevey McCoy, *Guantanamo Bay: The United States Naval Base and its Relationship with Cuba* 51 (unpublished Ph.D. dissertation, University of Akron, 1995) (on file at the University of Michigan) ("[t]he word 'ultimate' was interpreted to mean that Cuban sovereignty was interrupted during the U.S. occupancy").

5. Cuban authorities, too, have recognized implicitly that Cuba does not exercise complete sovereignty over the base as a result of the lease. The Cuban Supreme Court held 70 years ago that "the territory of that Naval Station is *for all legal effects regarded as foreign.*" *In re Guzman and Latamble*, Annual Digest & Reports of Pub. Int'l Law Cases, 1933-34, Case No. 43, at 112, 113 (emphasis added). Just six weeks after signing the lease, Cuban President Tomas Estrada Palma told the Cuban Senate that the base had been "cede[d]" to the United States. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES ("FOREIGN RELATIONS"), 1903, at 357. In 1912, the United States and Cuba signed an agreement to expand the base that characterized the 1903 lease as a "cession in lease" by which the base was "ceded in lease" to the United States. FOREIGN RELATIONS, 1912, at 295, 297. (The agreement never went into effect because the Cuban Senate failed to ratify it. Scheina, 4 STRATEGIC REVIEW at 82.) And a book published "under the auspices" of the Cuban government stated that the base had been "formally ceded" to

the United States. 5 Willis Fletcher Johnson, THE HISTORY OF CUBA, page following cover page, 89 (1920).[5]

6. As the long history of Guantanamo demonstrates, Cuba does not presently have—and has not had for the past century—sovereignty in any meaningful sense over the American base at Guantanamo. "'Sovereignty' is a term used in many senses and is much abused," but in general "it implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there." RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 206 comment b (1987). Or as this Court has recognized, "[a] basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Duro* v. *Reina*, 495 U.S. 676, 685 (1990). Cuba has no such power—indeed, it has no power whatever—over Guantanamo. See also *United States* v. *Rice*, 17 U.S. 246, 254 (1819) (Story, J.) (during the British occupation of Castine, Maine in 1814 and 1815, "[t]he sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there").

Rather, it is the United States that acts as sovereign at Guantanamo, for it is United States law that applies there. And it is the United States—and the United States alone—that has the power to enforce its law at Guantanamo over all who set foot within the naval station, including citizens of Cuba. When the United States and Cuba negotiated detailed terms to implement the February 1903 lease, Cuba proposed excluding

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[5] A "cession" is the "act of relinquishing property rights"—the "relinquishment or transfer of land from one state to another, esp. when a state defeated in war gives up the land as part of the price of peace." BLACK'S LAW DICTIONARY 221 (7th ed. 1999).

Cuban citizens from the application of U.S. law: "Cuban citizens who may have committed any crime or misdemeanor within the boundaries of said statio[n] shall be delivered to the Cuban authorities, for trial under the laws and by the tribunals of Cuba." Art. V, draft of proposed Cuban lease terms transmitted by Herbert Squiers, U.S. minister in Havana, to Secretary of State John Hay, Despatch No. 549, June 6, 1903, 7 Despatches from the United States Ministers to Cuba, 1902-1906, National Archives. But the United States rejected that proposal, June 20, 1903 telegram, Minister Squiers to Secretary Hay, *id.*, Despatch No. 572, and the proposed exclusion was dropped from the final agreement of specific lease terms signed by the United States and Cuba in July 1903. Instead, that document provided that *all* "fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within [the naval station], taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities." T.S. No. 426, Art. IV, 6 Bevans at 1121.

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Less than three months after the United States and Cuba signed the Guantanamo lease, President Theodore Roosevelt wrote Secretary of State Hay that "we regard the [Cuban] coaling stations as ours." Theodore Roosevelt to John Hay, May 12, 1903, Theodore Roosevelt Papers, Library of Congress, Manuscript Division, microfilm reel 416. The United States has treated Guantanamo "as ours" ever since—and it is perfectly entitled to continue to "exercise complete jurisdiction and control" (T.S. No. 418, Art. III, 6 Bevans at 1114) over the base as long as it likes. Under these unique circumstances, the government's contention that this Court lacks jurisdiction because *Cuba* is sovereign at Guantanamo, and the United States exercises *no* sovereign powers there, should be rejected.

V. Failure To Provide Any Judicial Review Of The Government's Actions Could Have Grave Consequences For U.S. Military Forces Captured In Future Conflicts.

It is especially important to the members of America's armed forces that American courts have jurisdiction to determine whether the treatment of the Guantanamo prisoners comports with American military regulations incorporating the "competent tribunal" guarantee of the Geneva Conventions. American failure to provide foreign prisoners with the protections of the Geneva Conventions may well provide foreign authorities, in current or future conflicts, with an excuse not to comply with the Geneva Conventions with respect to captured American military forces.

This Court has observed that "[t]he United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). See also Max Boot, THE SAVAGE WARS OF PEACE xiv (2002) ("Between 1800 and 1934, U.S. Marines staged 180 landings abroad"). In recent decades, American armed forces have been engaged somewhere abroad nearly every year. The historic pattern shows no sign of abating; "America's strategic situation today presents more opportunities than ever before for * * * entanglements" in "small wars." *Id.* at xix-xx.

It is, unfortunately, inevitable that some American military personnel involved in future conflicts will be captured or taken prisoner. When that happens, the United States government and the families and friends of the detained service men and women will share a strong interest: ensuring that American personnel are treated humanely and fairly.

In past conflicts the United States has insisted that American soldiers held by the enemy be accorded the basic protections of the Geneva Conventions. See, *e.g.*, Maj. Gen.

George S. Prugh, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973, at 63 (Dep't of the Army 1975); 64 DEP'T OF STATE BULL. 10 (Jan. 4, 1971) (White House statement announcing President Nixon's call for application of the 1949 Geneva Conventions to ease "the plight of American prisoners of war in North Viet-Nam and elsewhere in Southeast Asia").

The United States has also demanded application of the principles codified in the Geneva Conventions to captured U.S. service personnel, even when they were taken prisoner under circumstances when the Conventions, technically, did not apply. For example, following the capture of U.S. Warrant Officer Michael Durant by forces under the control of Somali warlord Mohamed Farah Aideed in 1993, the United States demanded assurances that Durant's treatment would be consistent with the broad protections afforded under the Conventions, even though, "[u]nder a strict interpretation of the Third Geneva Convention's applicability, Durant's captors would not be bound to follow the convention because they were not a 'state.'" Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War On Terror,"* 44 HARV. INT'L. L. J. 301, 310 (Winter 2003).[6]

Invoking international human rights standards, the United States also has condemned foreign governments that have held detainees incommunicado, depriving them of the ability to seek judicial review of their confinements. The United States, for example, objected recently when the Liberian government

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[6] American invocation of the Geneva Conventions evidently had its desired effect. "Following these declarations by the United States, heavy-handed interrogations of Durant appeared to cease, the Red Cross was allowed to visit him and observe his treatment, and he was subsequently released by Aideed as a 'gesture of goodwill.'" 44 HARV. INT'L L.J. at 310.

arrested journalist Hassan Bility and held him incommunicado on the purported ground that he was an "illegal combatant" involved in terrorist activity. AFRICA NEWS, Jan. 3, 2003 (available on Nexis). In a statement issued by our Ambassador in Monrovia, "[t]he United States call[ed] on the Government of Liberia to release those political and other prisoners, including those such as Hassan Bility * * *, who are being held without access to lawyers, the civil courts or independent observers" in "violation of international standards of human rights and legal protection, and contrary to Liberia's basic legal principles." John W. Blaney, Nov. 21, 2002 Press Conference statement (available at http://usembassy.state.gov/monrovia/wwwh112102.html). The Ambassador explained that "our reasons" for seeking the release of Bility—who had "been held in prison for many months without ever having been charged with any crime"—did "not revolve around whether we thought Mr. Bility was or was not guilty of any crime. That is not the point. An honest and competent civil court should have judged that question, not any individual or official." John W. Blaney, Jan. 2, 2003 Statement (available at http://usembassy.state.gov/monrovia/wwwhsp010203.html).

Yet even as American officials condemn other nations for detaining people indefinitely without access to a court or tribunal, authoritarian regimes elsewhere are pointing to U.S. treatment of the Guantanamo prisoners as justification for such actions. Eritrea's Ambassador to the United States defended his own government's roundup of journalists by claiming that their detention without charge was consistent with the United States' detention of material witnesses and aliens suspected by the United States of terrorist activities. Fred Hiatt, *Truth-Tellers in a Time of Terror*, WASH. POST, Nov. 25, 2002, at A15. See also Shehu Sani, *U.S. Actions Send a Bad Signal to Africa: Inspiring Intolerance*, INT'L HERALD TRIB., Sept. 15, 2003, at 6 ("indefinite detention in Guantanamo Bay * * *

helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso").

If American detention of the Guantanamo prisoners —indefinite confinement without any type of review by a court or tribunal—is regarded as precedent for similar actions by countries with which we are at *peace*, it is obvious that it may be similarly regarded by *enemies* who capture American soldiers in an existing or future conflict. As a result, the lives of captured American military forces may well be endangered by the United States' failure to grant foreign prisoners in its custody the same rights that the United States insists be accorded to American prisoners held by foreigners.

The importance of reciprocal treatment of a country's own citizens or soldiers and those of an enemy has an ancient pedigree. Nearly 800 years ago, the Magna Carta provided that foreign merchants from countries at war with England

> "shall be attached without harm of body or goods, until it be known unto us, or our chief justice, how our merchants be entreated who are then found in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us."

Eisentrager, 339 U.S. at 783 n.11 (quoting Magna Carta, chapter 30, in 3 THE COMPLETE STATUTES OF ENGLAND 27 (Halsbury's Laws of England 1929)).

During the Civil War, President Lincoln ordered that if the South "relapse[d] into barbarism" by murdering or enslaving free black soldiers captured in battle, the Union would "retaliat[e] upon the enemy's prisoners in our possession":

> [F]or every soldier of the United States killed in violation of the laws of war, a rebel soldier shall be executed; and for every one enslaved by the enemy or

> sold into slavery, a rebel soldier shall be placed at hard labor on the public works and continued at such labor until the other shall be released and receive the treatment due to a prisoner of war.

Order of Retaliation, July 30, 1863, in 6 COLLECTED WORKS OF ABRAHAM LINCOLN 357 (Roy P. Basler ed., 1953).

Reciprocity has been especially significant in the context of the Geneva Conventions of 1949. As noted earlier, the Eisenhower administration, when urging Senate ratification of the Conventions, stressed that American accession to the Conventions would redound to the benefit of captured American soldiers. Senators recognized the same thing. See pp. 6-7, *supra*. In Vietnam, the American decision to apply the Geneva Conventions' principles to captured enemy soldiers was driven in part by the desire to obtain "reciprocal benefits for American captives." Prugh, VIETNAM STUDIES at 62-63. And American insistence that the enemy apply the Geneva Conventions to American POWs in Vietnam saved American lives:

> [A]pplying the benefits of the Convention to those combat captives held in South Vietnam did enhance the opportunity for survival of U.S. service members held by the Viet Cong and North Vietnamese. While the enemy never officially acknowledged the applicability of the Geneva Convention, and treatment of American POWs continued to be brutal, more U.S. troops were surviving capture. Gone were the days when an American advisor was beheaded, and his head displayed on a pole by the Viet Cong. On the contrary, the humane treatment afforded Viet Cong and North Vietnamese Army prisoners exerted constant pressure on the enemy to reciprocate, and the American POWs who came home in 1973 survived, at least in part, because of [that].

Col. Fred L. Borch, Review of *Honor Bound*, 163 MIL. L. REV. 150, 152 (2000).

In the current debate about the Guantanamo prisoners, commentators have pointed out that "[t]he Geneva Conventions operate on the principle of reciprocity," Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 317 (2002), and that if the United States does not apply the Geneva Conventions, it heightens the risk that captured Americans will be denied the protection of the Conventions by foreigners. See Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 CORNELL INT'L L.J. 59, 90 (2003) ("Interpolating unrecognized exceptions into the contours of prisoner of war status * * * undermines the Geneva Conventions as a whole," and could easily "boomerang to haunt U.S. or allied forces: enemy forces that might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally creative reasons for denying prisoner of war status. By flaunting international law at home, the United States risks undermining its own authority to demand implementation of international law abroad"); Steven W. Becker, *"Mirror, Mirror on the Wall . . . " : Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563, 572 (2003) (American failure to grant POW status under the Geneva Convention "is placing U.S. military personnel abroad in danger, as we have troops in many parts of the world, and it is reasonable to assume that at some time some of them may be captured. If the same treatment is applied to them, we would be hard put to argue otherwise"); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 340 (2002) (it "seriously disserves the long-term interests of the United States—whose nonuniformed intelligence and military personnel will conduct extensive armed activities abroad in the months ahead—to assert that any captive who can be labeled an 'unlawful combatant' should be

denied prisoner-of-war status under the Geneva Conventions").[7] As one commentator has observed:

> What if another country were to arrest U.S. citizens, take them to a location over which that country had control, but no technical sovereignty, and then argue that the country's own law did not apply in that territory—so that our citizens would not have a right to counsel, or even to know what the charges against them might be? We would be distressed.

Anupam Chander, *Guantanamo and the Rule of Law: Why We Should Not Use Guantanamo Bay to Avoid the Constitution*, FindLaw's Legal Commentary (http://writ.news.findlaw.com/commentary/20020307_chander.html).

In 1950, the *Eisentrager* Court was concerned that permitting German nationals to seek habeas relief—after having received both a trial and post-conviction review by a military reviewing authority (339 U.S. at 766)—would "purchase no equivalent for benefit of our citizen soldiers." *Id.* at 779. The concern about equivalent benefit is different today. In the last half-century, nearly every country on the planet has adopted the 1949 Geneva Conventions, which, among other things, guarantees access to a "competent tribunal" when there is doubt about whether a detainee is a prisoner of war. It is the United States, which has incorporated the Geneva Conventions' competent tribunal

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[7] The danger that captured Americans might be mistreated is increased for those American forces overseas, some in Afghanistan for example, who do not always wear military uniforms. See Mary McGrory, *Bungling on the 9-11 Prisoners*, WASH. POST, Feb. 10, 2002, at B7; John Mintz & Mike Allen, *Bush Shifts Position on Detainees*, WASH. POST, Feb. 8, 2002, at A1; Jess Bravin et al., *Status of Guantanamo Bay Detainees is Focus of Bush Security Team's Meeting*, WALL ST. J., Jan. 28, 2002, at A16.

guarantee into American military regulations, that is presently deviating from international norms. Denying the Guantanamo prisoners access to a competent tribunal increases the danger that captured American forces will receive *that* "equivalent" treatment.

Seventy-five years ago, Justice Brandeis eloquently warned:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that * * * the end justifies the means * * * would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead, 277 U.S. at 485 (Brandeis, J., dissenting). The United States still serves as an example to the world. Our concern is that, in this instance, the government is setting an example that is not only fundamentally at odds with the rule of law, but that puts American troops in peril.

* * *

The questions posed by these cases are momentous. This Court has never held that foreigners captured abroad by the United States may be held indefinitely—perhaps for the rest of their lives—without bringing any charges against them and without ever providing the prisoners with some sort of hearing to determine their status. The importance of this question is magnified because the Guantanamo detentions could last a very long time indeed. The war on terror may go on for decades, and we will not know, at the time, when it is finally over. This war will not end with a surrender ceremony on the deck of the *Missouri*.

The issues in these cases are especially significant to the members of American military forces, who may be denied the protections of the Geneva Conventions in the future by foreign captors using American treatment of the Guantanamo detainees as precedent. If there is a "new paradigm" of warfare following September 11, as some contend, these cases will determine the rules, or lack of rules, that apply to captured prisoners in this new type of war—and potentially to Americans taken captive.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MIRNA ADJAMI
Midwest Immigrant and Human Rights Center
208 South LaSalle Street
Chicago, IL 60603
(312) 660-1330

JAMES C. SCHROEDER
Counsel of Record
GARY A. ISAAC
STEPHEN J. KANE
JON M. JUENGER
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Amici Curiae

JANUARY 2004

MOTION FILED
JAN 14 2004

(24) (24)

Nos. 03-334; 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF HUNGARIAN JEWS AND BOUGAINVILLEANS FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICI CURIAE*

JONATHAN W. CUNEO
DAVID W. STANLEY
MICHAEL WALDMAN
CUNEO WALDMAN
& GILBERT, LLP
317 Massachusetts Ave., N.E.
Suite 300
Washington, D.C. 20002
(202) 789-3960

STEVE W. BERMAN
Counsel of Record
R. BRENT WALTON
HAGENS BERMAN LLP
1301 Fifth Avenue
Suite 2900
Seattle, WA 98101
(206) 623-7292

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ, LLP
Commerce Bank Center
220 Alhambra Circle
Suite 400
Coral Gables, FL 33134
(305) 357-9004

Attorneys for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF OF HUNGARIAN JEWS AND BOUGAINVILLEANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the plaintiffs in *Rosner v. United States of America*, Case No. 01-1859-CIV-SEITZ, presently pending in U.S. District Court in the Southern District of Florida, 231 F. Supp. 2d 1202 (hereinafter "Hungarian Jews"), and the plaintiffs in *Sarei v. Rio Tinto*, Case No. 00-11695-MMM, reported at 221 F. Supp. 2d 1116, and which is presently pending in the Ninth Circuit Court of Appeals (hereinafter "Bougainvilleans"), respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners.

The United States has consented to the filing of this brief. Counsel for Petitioner Rasul, *et al.*, has also consented to the filing of this brief. Counsel for *amici* has attempted to contact counsel for the other Petitioners by telephone to obtain Petitioners' consent. Counsel was referred to additional counsel in an effort to coordinate *amici* filings and obtain consent. To date, counsel has not been able to obtain the remaining Petitioners' consent, thereby necessitating the filing of this motion.

The Hungarian Jews, which include U.S. citizens as well as resident and nonresident aliens, allege in their lawsuit that their personal possessions and family heirlooms were accepted into protective custody in occupied Austria by the United States Army in 1945 after World War II had ended. The United States failed to return the property or pay them any compensation for their property. Among other things, the Hungarian Jews have asserted takings claims and other claims against the United States under the Little Tucker Act, the Fifth Amendment, and the Administrative Procedures Act.

The Bougainvilleans are involved in an Alien Tort Statute, 28 U.S.C. § 1350, case and have asserted claims of genocide, war crimes, racial discrimination, and crimes against humanity, among other things, against Rio Tinto, a private corporation. The case is *Sarei v. Rio Tinto*, Case No. 00-11695-MMM, and is discussed in a decision reported at 221 F. Supp. 2d 1116 (C.D. Cal.).

Amici's interest in this case stems from the D.C. Circuit's ruling that no alien can assert any constitutional claim in federal court or receive any constitutional protections without actually being in the country or having property in the United States. The D.C. Circuit made this ruling while assuming that at least some of the Petitioners are *alien friends*. The D.C. Circuit elaborated further, announcing a broad and rigid rule that all foreigners — persons and corporations, friendly and enemy alike — who lack any "property or presence in this country [have] no constitutional rights, under the due process clause or otherwise." 321 F.3d 1134, 1141 (D.C. Cir. 2003). Additionally, the D.C. Circuit explained that "the [federal] courts are not open" to such aliens *for any claim* and therefore, the claims must be dismissed for lack of jurisdiction. *Amici* are concerned that these rulings, which were all issued in the context of a habeas corpus petition and the criminal context, will undo the longstanding precedent of this Court that nonresident aliens are entitled to due process, access to the courts, and constitutional protections including those protected by the Just Compensation Clause. Such a sweeping ruling has the potential to set aside dozens of cases now pending in the federal courts, including the cases of the Hungarian Jews and Bougainvilleans.

For the foregoing reasons, Hungarian Jews and Bougainvilleans respectfully request that they be permitted to participate in this case by filing the attached brief.

Respectfully submitted,

STEVE W. BERMAN
Counsel of Record
R. BRENT WALTON
HAGENS BERMAN LLP
1301 Fifth Avenue
Suite 2900
Seattle, WA 98101
(206) 623-7292

JONATHAN W. CUNEO
DAVID W. STANLEY
MICHAEL WALDMAN
CUNEO WALDMAN
& GILBERT, LLP
317 Massachusetts Ave., N.E.
Suite 300
Washington, D.C. 20002
(202) 789-3960

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ, LLP
Commerce Bank Center
220 Alhambra Circle
Suite 400
Coral Gables, FL 33134
(305) 357-9004

Attorneys for Amici Curiae

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BRIEF OF U.S. CITIZENS AND ALIEN FRIENDS REPRESENTING HUNGARIAN JEWS AND BOUGAINVILLEANS

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Hungarian Jews and Bougainvilleans are set forth in the motion accompanying this brief.[1]

STATEMENT OF THE CASE

Amici curiae Hungarian Jews and Bougainvilleans hereby incorporate by reference the Statement of the Case contained in Petitioners' brief.

In brief, in the underlying action, the Court is considering whether aliens, be they enemies or friends, can challenge the legality of their detention at Guantanamo Naval Base, Cuba ("Guantanamo"). The Court of Appeals for the District of Columbia Circuit affirmed the dismissal of a complaint brought by Petitioners for lack of jurisdiction based on an incorrect reading of this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, this Court held that 21 German nationals who were convicted of engaging in military activity against the United States in World War II — enemy aliens — could not use the Great Writ of habeas corpus to challenge their convictions for war crimes, which was convened before a military tribunal in Germany, in a U.S. civilian court. The D.C. Circuit, while

1. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

assuming that at least some of the Petitioners are *alien friends*, however construed *Eisentrager* to reflect the proposition that constitutional guarantees do not apply and are not "held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens." 321 F.3d 1134, 1141 (D.C. Cir. 2003). The D.C. Circuit elaborated further, explaining its erroneous position, that *Eisentrager* announced a broad and rigid rule reminiscent of Jim Crow era laws that all foreigners — persons and corporations, friendly and enemy alike — who lack any " 'property or presence in this country [have] no constitutional rights, under the due process clause or otherwise.' " *Id.* at 1141. Based on this reading of *Eisentrager* and subsequent decisions of this Court, the D.C. Circuit upheld the dismissal of Petitioners' complaint for lack of jurisdiction. It is this legal proposition — that nonresident aliens are not entitled to due process, access to the courts, or any constitutional protections — that *amici* take issue with and address herein.

SUMMARY OF ARGUMENT

Under certain circumstances, nonresident aliens are entitled to specific constitutional protections under the Fifth Amendment, including due process of law, and are entitled to assert claims in U.S. courts. The D.C. Circuit erred in holding that nonresident aliens cannot assert constitutional claims or any claim in the federal courts.

The D.C. Circuit, while assuming that at least some of the Petitioners are *alien friends*, construed this Court's decision in *Eisentrager* to reflect the proposition that constitutional guarantees are not "held by aliens outside the sovereign territory of the United States, regardless of whether

they are enemy aliens." 321 F.3d 1134, 1140 (D.C. Cir. 2003). The court announced a broad and rigid rule that all foreigners — persons and corporations, friendly and enemy alike — who lack any "property or presence in this country [have] no constitutional rights, under the due process clause or otherwise." *Id.* at 1141. The D.C. Circuit's holding went even further in denying Petitioners other claims which are also cognizable in federal courts, and explained that as to these people, the courthouse doors are closed. *Id.* at 1145.

1. The federal courts of the United States have been open to nonresident aliens since the Judiciary Act of 1789, when the courts were created. Originally, Congress granted aliens access to the federal courts under both sections 9 and 11 of the Act. The prior being the predecessor to the Alien Tort Statute, 28 U.S.C. § 1350, and the latter being so-called diversity jurisdiction. Similarly, an alien can also access our courts through federal question jurisdiction. Thus, the D.C. Circuit erred in deciding that the courthouse doors are closed to nonresident aliens.

A. Furthermore, the D.C. Circuit erred in holding that nonresident aliens have no constitutional protections. This Court has decided that nonresident aliens have certain constitutional protections depending on the facts and the right asserted. For example, in *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), this Court held that a nonresident Russian corporation was protected by the Just Compensation Clause and could recover for sea vessels that were expropriated by the United States. Numerous decisions are in similar accord. *Guessefeldt v. McGrath*, 342 U.S. 308, 318 (1952) ("friendly aliens are protected by the Fifth Amendment requirement of just compensation"); *United States v. Caltex, Inc.*, 344 U.S. 149, 155 (1952) (nonresident friendly alien

may assert a takings claim against the military, but deciding on the merits that no taking occurred); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("aliens shall not . . . be deprived of life, liberty or property without due process of law"); *United States v. Pink*, 315 U.S. 203, 228 (1942) ("aliens as well as citizens are entitled to the protection of the Fifth Amendment"); *Turney v. United States*, 126 Ct. Cl. 202 (1953); *Seery v. United States*, 127 F. Supp. 601, 603 (Ct. Cl. 1955) (permitting taking claim against U.S. Army for expropriations that occurred in occupied Austria in July 1945); *Cardenas v. Smith*, 733 F.2d 909, 915-16 (D.C. Cir. 1984) ("It is beyond peradventure that a foreign nonresident, *non-hostile alien* may, under some circumstances, enjoy the benefits of certain constitutional limitations imposed on United States actions;" citing cases) (emphasis added); *Porter v. United States*, 496 F.2d 583, 591 (Ct. Cl. 1974) (rejecting the government's argument that takings do not apply to U.S. action abroad or brought by nonresident alien; deciding on the facts that as a matter of law the U.S. did not "take" the property); *HongKong & Shanghai Banking Corp. v. United States*, 1956 A.M.C. 1446 (Ct. Cl. 1956) (permitting taking claim brought by Hong Kong corporation against the Army and deciding on the merits that no "taking" occurred).

B. By design, the Constitution limits the power of the federal government to the enumerated powers therein and those implied by the need to carry out the enumerated powers. Since *Marbury v. Madison*, it has been the province and duty of this Court to ensure that all branches act within the limits there expressed and decide what those limits are. This Court has recognized that the Constitution imposes limits on the government even when it acts overseas. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957). Such a limitation is not a product of alienage; instead, it is by constitutional design that the power,

authority, and legitimacy of the government is tied to acting in accordance with the limitations imposed on it by the people.

C. When someone — indeed anyone — challenges federal action as being beyond the limits that are imposed by the Constitution, it is the federal courts that are empowered to decide the merits of that challenge. As this Court explained in *Bell v. Hood*, 327 U.S. 678, 681-82 (1946), "where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, *the federal court . . . must entertain the suit*." (emphasis added); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (same).

D. Nevertheless, the D.C. Circuit felt constrained by this Court's decisions in *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and affirmed the dismissal of Petitioners' complaint for lack of jurisdiction. The D.C. Circuit misunderstood the holdings and import of these two cases.

First, both cases involved what can only be called enemy aliens who attempted to assert claims as enemies of the country. For example, Verdugo-Urquidez was an alleged Mexican drug-lord being prosecuted in the U.S. for drug trafficking during the so-called "drug war." And the plaintiffs in *Eisentrager* were German Nazis engaged in a war against the United States while in Japan.

Second, neither case announced a broad and rigid constitutional principle. Indeed, the Court's opinion in *Verdugo-Urquidez* is very splintered and cautions strongly

against a broad application of the case to other constitutional issues. In particular, this Court explained that the Fifth Amendment was not at issue and functioned differently than the Fourth Amendment, which was at issue. Moreover, Justice Kennedy, the fifth vote in the majority opinion, emphasized that even Vedugo-Urquidez was protected by the Constitution: "[a]ll would agree . . . that the dictates of the *Due Process Clause of the Fifth Amendment* protect [Verdugo-Urquidez]." 494 U.S. at 278 (emphasis added).

Equally, *Johnson v. Eisentrager* did not hold that *all* aliens could not claim the protections of the Fifth Amendment outside the sovereign territory of the U.S. Instead, this Court specifically held that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an *alien enemy* engaged in the hostile service of a government at war with the United States." 339 U.S. at 785 (emphasis added). This Court could not have been more clear: it was "*war that exposes the relative vulnerability of the alien's status*." It was war that persuaded this Court that the constitutional guarantees that might have been available were no longer available to persons who were the enemy of the people of the United States; it was not that the people asserting the rights were aliens.

E. Friendly aliens have been permitted to assert constitutional claims and access federal courts since the inception of the federal judiciary. Congress has seen to this. Today, Congress continues to permit aliens to access the federal courts and to bring suits against the United States. It has done so by predicating waivers of sovereign immunity on the kind of claim asserted rather than the alienage of the plaintiff or petitioner. The Tucker Act, the APA or the Federal Tort Claims Act permits a lawsuit against the United States

with a discriminatory proviso that it not be brought by an alien. The D.C. Circuit erred to the extent it precluded all aliens from asserting constitutional protections and other claims in federal courts.

ARGUMENT

I. ALIEN FRIENDS ARE ENTITLED TO ASSERT LEGAL CLAIMS IN UNITED STATES COURTS

Throughout U.S. history our courts, both federal and state, have been open to citizens and foreigners alike, even in times of war and even with regard to ascertaining the constitutionality or legality of actions taken by the United States. For example, in *The Paquette Habana*, 175 U.S. 677 (1900), this Court decided a claim brought against the United States under section 9 of the Judiciary Act of 1789 by nonresident aliens who evidently did not have any property in the United States. This Court decided that the capture of two fishing vessels in foreign waters and sailing under the Spanish flag while America was at war with Spain was illegal and *ordered* that damages be paid to the nonresident aliens. *Id.* at 714. Additionally, the seminal decision of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), involved Virginia's confiscation of Lord Fairfax's estate.

It should come as no surprise that aliens have access to U.S. courts. Indeed, access by aliens to federal courts was of great concern of the Founding Fathers. In THE FEDERALIST (No. 80), Alexander Hamilton wrote:

> The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to

> be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquillity.

Hamilton's concerns were heeded, and the federal courts were given jurisdiction to hear alien claims. Congress enacted the Judiciary Act of 1789 which, in section 9, provided:

> The district courts shall . . . have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.[2]

The opinion of former Attorney General William Bradford, published in 1795, addressing the liability of U.S. citizens accused of violating the law of nations, confirms this when he states:

> [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a *remedy* by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where

2. Substantially the same language of the original Act is now the Alien Tort Statute, 28 U.S.C. § 1350.

> an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.

1 Op. Att'y Gen. 57, 59, 1795 U.S. AG Lexis 1, *3-*4 (July 6, 1795) (emphasis on remedy supplied). Similarly, in section 11 of the Act, Congress also provided aliens access to the federal courts under diversity jurisdiction.

Thus, whatever the ultimate decision in this case is, it is not the case that aliens cannot have and do not have access to U.S. courts at all. Indeed, the contrary proposition is proved with great frequency whenever foreign corporations and/or nonresident aliens successfully file a lawsuit in federal court.

Instead, the issue is one of whether aliens can ever assert any protection guaranteed by the Constitution. Again, this particular question should be answered by an unqualified "yes."

A. Alien Friends Are Entitled To The Protections Of The Just Compensation Clause

The Just Compensation Clause of the Fifth Amendment — also known as the Takings Clause — provides: "nor shall private property be taken for public use, without just compensation." In *Russian Volunteer Fleet*, 282 U.S. 481 (1931), a nonresident Russian corporation sought to recover just compensation for certain sea vessels that were expropriated by the United States. Like the District Court here, the Court of Claims dismissed the suit for lack of jurisdiction because the plaintiff was an alien. This Court however *unanimously* reversed that decision and held that an "alien friend" is "entitled to the protection of the Fifth Amendment of the Federal Constitution." *Id.* at 489.

This Court went so far as to rule in favor of the plaintiff on the merits, stating "in taking the petitioner's property, the United States became bound to pay just compensation." *Id.*

This Court explained its reasoning as follows:

> The Fifth Amendment gives *to each owner of property his individual right.* The constitutional right of owner A to compensation when his property is taken is irrespective of what may be done somewhere else with the property of owner B. As *alien friends are embraced within the terms of the Fifth Amendment*, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. *The provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments.*

Id. at 491-92 (emphasis added); *see also Guessefeldt v. McGrath*, 342 U.S. 308, 318 (1952) ("friendly aliens are protected by the Fifth Amendment requirement of just compensation"); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("aliens shall not . . . be deprived of life, liberty, or property without due process of law"); *United States v. Pink*, 315 U.S. 203, 228 (1942) ("aliens as well as citizens are entitled to the protection of the Fifth Amendment").[3]

3. *See also Becker Steel Co. v. Cummings*, 296 U.S. 74, 79-80 (1935); *Seery v. United States*, 127 F. Supp. 601, 603 (Ct. Cl. 1955) (permitting taking claim against U.S. army for expropriations that occurred in occupied Austria in July 1945); *Cardenas v. Smith*, 733 (Cont'd)

Insofar as relevant to the Question Presented by this Court, the main factual difference between *Russian Volunteer Fleet* and this case is that here the claims all stem from actions that evidently occurred in a foreign land.[4] In *Turney v. United States*, 126 Ct. Cl. 202 (1953), a five-judge panel of the Court of Claims confronted the Takings issue where all actions occurred in a foreign land. In *Turney*, a Philippine corporation acquired radar equipment from the Philippine government. The equipment was among certain surplus assets found by the United States at the Leyte Air Depot following World War II and conveyed to the Philippine government. The new owner of the radar equipment entered into negotiations with the Chinese Air Force. Concerned about national security, the United States objected to the sale and informed the corporation that it would repossess the radar by negotiation or seizure with the aid of the Philippine government.

(Cont'd)
F.2d 909, 915-16 (D.C. Cir. 1984) ("It is beyond peradventure that a foreign nonresident, *non-hostile alien* may, under some circumstances, enjoy the benefits of certain constitutional limitations imposed on United States actions;" citing cases) (emphasis added); *Porter v. United States*, 496 F.2d 583, 591 (Ct. Cl. 1974) (rejecting the government's argument that takings do not apply to U.S. action abroad or brought by nonresident alien; deciding on the facts that as a matter of law the U.S. did not "take" the property); *HongKong & Shanghai Banking Corp. v. United States*, 1956 A.M.C. 1446 (Ct. Cl. 1956) (permitting taking claim brought by Hong Kong corporation against the Army and deciding on the merits that no "taking" occurred).

4. *Amici* understand that whether Guantanamo is in a foreign land or under U.S. sovereignty or control is a question that the Court may need to resolve in this case. *Amici* do not intend anything expressed here to be construed as expressing an opinion on the legal status of Guantanamo.

The Philippine government placed an embargo upon the exportation of any surplus materials from the Leyte Air Depot. Not able to export any of its property, the alien corporation negotiated with the United States. It agreed to return the radar equipment in exchange for a full receipt of the material given and a reservation of the right to sue the United States for its losses.

Through a liquidation trustee, Mr. Turney, the Philippine corporation filed suit alleging that a taking had occurred which required just compensation. The court concluded:

> We now consider whether the repossession was a "taking," covered by the Fifth Amendment. We think that it was. The relations, at the time, between our Government and the Philippine Government, were close. Our armed forces had just liberated the Philippines from the Japanese. Our Government had given one hundred million dollars worth of surplus property to the Philippines, including the property at the Leyte Air Depot, and had sold the property for the account of the Philippine Government. When we requested that Government to place an embargo upon the exportation of any of the property, it, naturally, readily complied. That put irresistible pressure upon the corporation to come to terms with the United States Army, the terms being that the radar equipment would be segregated in charge of the Army and would not be disposed of until a final agreement was reached as to its disposition. The final agreement turned the property back to the army in exchange for a receipt, and with a reservation of the right to sue for its value.

> We think that the taking occurred on October 13, 1947, when the Army officially took possession of the property. The plaintiff is entitled to recover its fair value as of that date, with interest added as a part of just compensation.

Turney, 126 Ct. Cl. at 214. The court expressly rejected the argument that the Just Compensation Clause does not apply in foreign countries. *Id.* at 215. The court followed the *Russian Volunteer Fleet* holding and applied it to permit a nonresident alien friend to assert a Fifth Amendment claim against the United States even though the taking occurred in a foreign country. *Id.* The court's reasoning was straightforward: because both alien friends and citizens are protected by the Just Compensation Clause, and because courts have permitted U.S. citizens to assert claims for property taken in foreign lands, alien friends may also assert such claims. *Id.*

Similarly, in *Caltex (Philippines), Inc. v. United States*, 100 F. Supp. 970, 979 (Ct. Cl. 1951), the Court of Claims permitted a taking claim against the U.S. to be brought by nonresident aliens. On appeal, this Court reversed the decision explaining that no compensable taking occurs when the military acts to destroy potentially valuable enemy assets that could be used to wage war against the U.S. *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 155 (1952). Significantly, though only two years after *Eisentrager*, this Court simultaneously acknowledged that under some circumstances a taking claim might be permitted. "No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts." *Id.* at 156.

Thus, there is little merit to the D.C. Circuit's broad statement that nonresident aliens have no constitutional protections. Indeed, even the U.S. has argued to this Court that aliens enjoy some constitutional protections.

> Congress's plenary power over aliens does not, however, render the Due Process Clause of the Fifth Amendment altogether inapplicable to petitioner. As the court of appeals acknowledged, petitioner and other aliens "can of course claim some constitutional protections." J.A. 207 (also noting that, under Fifth Circuit precedent, even excludable aliens who fail to effect an entry into the United States are considered persons entitled to protection under the Fourteenth Amendment (citing *Lynch v. Cannatella*, 810 F.2d 1363, 1375 (1987)). *Cf. Jean v. Nelson*, 472 U.S. 846 (1985) (remanding for consideration of how discretion was exercised under statute and declining to reach constitutional issue of whether Fifth Amendment applies to consideration of unadmitted aliens for parole); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that alien children who were not legally admitted into United States were "persons" entitled to claim benefit of Equal Protection Clause of Fourteenth Amendment).

U.S. *Brief*, *Kestutis Zadvydas v. Lynne Underdown and Immigration And Naturalization Service*, 1999 U.S. Briefs 7791, at *34 (2001).

Consequently, the issue of whether and when an alien may assert a protection offered by the Constitution should be handled on a case-by-case basis, amendment-by-

amendment or perhaps clause-by-clause. The issue should not be decided, as the D.C. Circuit has, using a one-size fits all rule predicated solely on the basis of "property or presence in this country." To the contrary, the D.C. Circuit's overly broad interpretation of this Court's jurisprudence and rigid rule for all constitutional issues, if affirmed, would overrule this Court's long-standing precedent as applied to amendments not at issue in this case, as well as undermine the constitutional design that the people created with a federal government of specifically enumerated and limited powers.

B. The Federal Government Possesses Specifically Enumerated Powers That Are, At Times, Enforced By Federal Courts Even When The Government's Actions Occur In Foreign Lands

One of the first principles of our great country is that the federal government is limited in its power; limited to those powers specifically granted it by the people.[5] The purpose and design of the Constitution requires adherence to retaining the divisions of power. Indeed, as this Court has repeatedly explained, the constitutionally-mandated division of the people's sovereign powers is integral to preventing tyranny and was adopted by the Framers of the Constitution to protect our fundamental liberties.

---

5. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted."); *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers."); *see also* U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

The D.C. Circuit's ruling threatens an unprecedented feat of granting the Judicial power to say what the law is to the Executive without once endeavoring to explain the authority under the Constitution that provides such authority to the President. Though it may not seem so today, it is beyond dispute that the Framers were distrustful of Executive power and limited the President's authority to ensure it was not kingly. Indeed, Madison emphasized at the Constitutional Convention that the Framers intended "to fix the extent of the executive authority," not confer open-ended powers. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (M. Farrand ed. 1937). Madison added, "executive powers [should] be confined and defined — if large we shall have the Evils of elective Monarchies." *Id.* at 70. And, when Congress or the Executive acts beyond the scope of its enumerated powers, therefore, it acts without constitutional authority, that is, tyrannically, and places liberty at risk. In such circumstances, it is incumbent on this Court to restrain the conduct, even when it occurs overseas.

As this Court is well aware, the federal government's power is limited even as applied to its actions in foreign lands or affecting aliens. Indeed, in *Reid v. Covert*, 354 U.S. 1, 5-6 (1957), this Court explained: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." *See also id.* at 56 (Frankfurter, J., concurring) ("Governmental action abroad is performed under both the authority and the restrictions of the Constitution."); *cf. id.* at 66 (Harlan, J., concurring) (same).[6]

6. *See also Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) ("The government . . . can claim no powers which are (Cont'd)

It was in *Reid* that this Court took a major step in the development of extraterritorial constitutional application when it held that the Constitution controls government actions taken abroad. In *Reid*, a United States military tribunal in England tried an American civilian for the murder of her husband, an Air Force officer. The murder was committed on an Air Force base in England. In noting that the Constitution applied to government actions in foreign lands, Justice Black explicitly relied upon the enumerated powers doctrine. In *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), the *Reid* plurality garnered a majority.

Since *Reid*, the argument that the Constitution has territorial limits has been rejected when U.S. citizens invoke their rights. As to the prior cases (*e.g.*, the *Insular Cases* and *In re Ross*), this Court explained: "it is our judgment that neither the cases nor their reasoning should be given any further expansion." *Reid*, 354 U.S. at 14; *see also id.* at 12 ("The *Ross* approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases. . . . At best, the *Ross* case should be left as a relic from a different era."); *id.* at 56 (Frankfurter, J.) ("Insofar as [*Ross*] expressed a view that the Constitution is not operative outside the United States . . . it expressed a notion that has long since evaporated. Governmental action abroad is performed under both the authority and the restrictions of the Constitution").

The D.C. Circuit Court of Appeals has also shown its willingness to entertain and adjudicate constitutional issues

(Cont'd)
not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) (same).

under the Just Compensation Clause, even though the actions involved U.S. military matters that occurred in a foreign land. In *Ramirez de Arellano v. Weinberger*, an en banc panel of the Court of Appeals for the D.C. Circuit held that the adjudication of whether the military may run operations on a U.S. citizen's private property in a foreign country that had not yet been appropriated did not present a nonjusticiable political question despite the United States arguing that it did, and the district court finding that the suit presented a direct challenge to the propriety of the U.S. military presence in Central America. 745 F.2d 1500, 1512 (D.C. Cir. 1984), *vacated on other grounds*, 471 U.S. 1113 (1985). In particular, the court explained:

> Not every issue related to foreign relations, however, is constitutionally committed for resolution by the Executive. *Baker v. Carr* states that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Issues which are not at base sweeping challenges to the Executive's foreign policy typically are adjudicated by the courts because they do not involve judicial usurpation of the Executive's constitutional powers to manage foreign affairs.
>
> A careful analysis of the plaintiffs' case shows that their claims are not exclusively committed for resolution to the political branches. . . . [T]he plaintiffs do not seek to adjudicate the lawfulness of the United States military presence abroad. Instead, they seek adjudication of the narrow issue whether the United States defendants may run military exercises throughout the plaintiffs'

> private pastures when their land has not been lawfully expropriated. They do not challenge the United States military presence in Honduras. . . . Plaintiffs' claim, properly understood, is narrowly focused on the lawfulness of the United States defendants' occupation and use of the plaintiffs' cattle ranch.
>
> This is a paradigmatic issue for resolution by the Judiciary.

Id.; *see also Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 147 (D.C. Cir. 1983) (Scalia, J.)

> To be sure, because this case involves land in Central America, and because United States military activities in that region are currently the subject of national interest and debate, the issue is presented in a more politically charged context. That may make it, in a sense, a political case — but as the Court noted in *Baker v. Carr* . . . 'the doctrine . . . is one of "political questions," not one of "political cases." '

Thus, unless this Court is to overturn *Reid* and *Kinsella* and other cases, it cannot be the case that simply because the U.S. actions at issue occurred outside the United States renders the Constitution inapplicable or precludes a court from entertaining constitutional questions. Instead, the only principled manner in which the constitutional issue can be decided must be based on the status of the individual asserting the particular right and the purpose the particular constitutional right was intended to protect. However, the final arbiter of that decision — of whether aliens may assert

a particular constitutional protection — must be the federal courts unless the new millennium has brought about the demise of *Marbury v. Madison* and given the Executive the power to say what the law is.

C. Federal Jurisdiction Is Apparent Here Because Constitutional Claims Are Alleged

Just like all branches of the federal government, according to constitutional design the federal courts are also limited in their power. Indeed, federal courts are often referred to as courts of limited jurisdiction. Naturally, jurisdiction is essential to the legitimacy of any exercise of judicial power. The consequence of being without jurisdiction is that a federal court is without any authority or legitimacy. As this Court recently stated: "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

> Hypothetical jurisdiction produces nothing more than a hypothetical judgment — which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. . . . Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. . . . For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.

Steel Co., 523 U.S. at 101-02 (citations omitted).[7]

This Court has also long settled the debate of whether constitutional issues provide federal jurisdiction. In *Bell v. Hood*, 327 U.S. 678, 681-82 (1946), this Court explained that "where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, *the federal court*, but for two possible exceptions later noted, *must entertain the suit*." (emphasis added); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (same). The two exceptions this Court referred to in *Bell v. Hood* are: (i) "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction" and (ii) "where such a claim is wholly insubstantial and frivolous." *Id.* at 682-83. Today, the reasons where this Court permits a dismissal for lack of jurisdiction perhaps has expanded and can perhaps be rephrased to include those claims that are "so insubstantial . . . [or] implausible . . . [or] foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co.*, 523 U.S. at 89 (quoting *Oneida Indian Nation of N. Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)). Whatever the exact parameters of a valid dismissal of a constitutional claim for lack of jurisdiction

7. The D.C. Circuit affirmed a dismissal that was *with prejudice*. The decision of this Court in *Steel Co.* evidences that the "with prejudice" ruling of the District Court must be reversed; only decisions on the merits and within the jurisdiction of the court can be with prejudice.

are, one thing is clear: this Court has not decided the particular constitutional issue presented here. Therefore, under *Bell*, there is federal jurisdiction to decide the constitutional claims asserted.

Nevertheless, the D.C. Circuit felt itself constrained by circuit precedent and upheld the district court's dismissal for lack of jurisdiction. The error of the D.C. Circuit was based on a misunderstanding or misreading of two cases: (i) *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and (ii) *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

D. Neither *United States v. Verdugo-Urquidez* Nor *Johnson v. Eisentrager* Announced A Rigid Rule Of Constitutional Law That Aliens Are Not Entitled To Assert Constitutional Claims

This Court's decision in *Verdugo-Urquidez* is a splintered opinion that cautions against broad interpretation of rigid constitutional principles. Indeed, this Court went to great lengths to explain that it was a case anchored to its specific facts; a limitation that the D.C. Circuit's broad ruling threatens to unmoor. For example, this Court expressly emphasized that the case that was before it was a different kind of case, involving a different history and operation than the Fifth Amendment. *See id.* at 264 ("Before analyzing the scope of the Fourth Amendment, *we think it significant to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case.*") (emphasis added). And, like *Eisentrager*, it was a case brought by an enemy of the United States.

Verdugo-Urquidez was an alleged Mexican drug-lord being prosecuted in the U.S. for drug trafficking. By the time

the case came to the Court, Verdugo-Urquidez had been convicted, in a separate prosecution, for his involvement in the torture and murder of DEA agent Enrique Camarena Salazar. 494 U.S. at 262. He thus was, for all practical purposes, a nonresident *enemy alien* of the United States. He had been seized by Mexican police in Mexico and delivered into American custody at the California/Mexico border. The next day, while he was incarcerated in San Diego, DEA agents, in concert with Mexican police, searched his home in Mexico and found business records of his narcotics smuggling enterprise. A divided Ninth Circuit panel suppressed this evidence as having been seized in violation of the Warrant Clause of the Fourth Amendment. This Court reversed, with six Justices (in three different opinions) agreeing that the search should be upheld as constitutional but for different reasons. Three Justices dissented. And although Chief Justice Rehnquist's opinion was the "Opinion of the Court" as Justice Kennedy concurred in it, Justice Kennedy's concurrence diverges so greatly from Chief Justice Rehnquist's analysis that Chief Justice Rehnquist's opinion seems to be speaking for a plurality of four.

The majority opinion held that the enemy alien in the case had no constitutional protection against the actions taken by the United States in foreign countries that did or would have otherwise implicated the search and seizure clause of the Fourth Amendment. *Id.* at 261. Significantly, this Court did not hold that Verdugo-Urquidez had no Fourth Amendment rights at all, or that he could not assert such a legal claim; only that under the facts and circumstances, the Fourth Amendment protections afforded by the search and seizure or warrant clause did not protect him. Indeed, Justice Kennedy specifically rejected such a rigid assertion that nonresident aliens have no constitutional protections.

See id. at 276-78. As but one example of the constitutional protections even a nonresident, criminal and enemy alien would have, Justice Kennedy emphasized that "[a]ll would agree . . . that the dictates of the *Due Process Clause of the Fifth Amendment* protect [Verdugo-Urquidez]." *Id.* at 278 (emphasis added).[8]

Aside from this Court's express emphasis that the case was a different kind of case, involving a different history and operation than the Fifth Amendment, *id.* at 264, this Court also noted that the decision was reached in part because the Fourth Amendment includes a "term of art" that is not included in the Fifth Amendment. *Id* at 264-66. The Fifth Amendment, in contrast to the Fourth, applies to "persons" which this Court has held includes alien friends. *See supra.*[9] Thus, even if *Verdugo-Urquidez* can be seen as providing a new constitutional principle applicable to aliens, it does not overrule *Russian Volunteer Fleet* and the other cases cited above that specifically address the Just Compensation Clause or other Fifth Amendment issues.

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8. Justice Kennedy adopted the view espoused by Justice Harlan in *Reid*, that the question of what the Constitution requires abroad "can be reduced to the issue of what process is 'due' a defendant *in the particular circumstances of a particular case.*" *Id.* at 270 (emphasis added).

9. Another difference between the Fourth Amendment and the Just Compensation Clause is that the Just Compensation Clause addresses "private property" and not "the people" or "persons", and it expressly requires the government to pay compensation whenever private property is taken for public use except, as this Court has declared, under some circumstances during wartime. *See supra.* There are several additional differences that would require many more pages to explain. For present purposes, *amici* simply point out that the Just Compensation Clause is different, serves a different purpose and has a different history than the Fourth Amendment.

Equally, *Johnson v. Eisentrager* is of little assistance to the D.C. Circuit's ruling. Like *Verdugo-Urquidez*, *Johnson v. Eisentrager* involved an enemy alien in the criminal context. Moreover, *Johnson v. Eisentrager* did not hold that *all* aliens could not claim the protections of the Fifth Amendment outside the sovereign territory of the U.S. Instead, this Court specifically held that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an *alien enemy* engaged in the hostile service of a government at war with the United States." *Id.* at 785 (emphasis added). In particular, this Court emphasized and explained that it was the fact that the person's country was actively waging war against the U.S. that was critical to the legal reasoning:

> *It is war that exposes the relative vulnerability of the alien's status.* The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us. . . . But *disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage.*

Id. at 771-72 (emphasis added).

Amici thus assert that the critical factual issue in both *Verdugo-Urquidez* and *Johnson v. Eisentrager* is that the alien asserting the protection of the Constitution was an enemy of the United States. This is the long-standing rule of law, which was lost on the D.C. Circuit, that should be recognized again. Indeed, it was this distinction that was critical to this Court's

takings jurisprudence that involved the Civil War as well as the other takings cases cited above involving aliens. As this Court explained in *United States v. Pacific Railroad Co.*, 120 U.S. 227, 233, 239 (1887):

> The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. . . . The inhabitants of the Confederate States on the one hand and of the States which adhered to the Union on the other became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other.

It is the incident of war that changes everything; it is not alienage.

E. Federal Courts Are Open To Aliens To Assert Legal Claims

In one portion of its ruling, the D.C. Circuit also explains that "the [federal] courts are not open to" Petitioners, which includes individuals that the court considered nonresident alien friends. To the extent that this Court considers the Question Presented as being one about whether the federal courts are open to Petitioners to challenge the legality of the detention at all and under any circumstance or with any legal claim, then the answer to that question is again "yes."

Nonresident aliens may assert damage claims and other claims against the United States under the Tucker Act.[10] In relevant part, the Tucker Act provides:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon *any claim against the United States* founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491 (emphasis added). Presumably, this congressional waiver of sovereign immunity would permit an alien and citizen alike to assert claims against the United States. Indeed, whether the lawsuit can be brought turns upon the claim, not the alienage of the person asserting the claim. As this Court has explained; "[I]f a *claim* falls within the terms of the Tucker Act, the United States has presumptively consented to suit." *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (emphasis added). Similarly, the Federal Tort Claims Act and the Administrative Procedures Act ("APA") do not prohibit aliens from filing lawsuits against the United States in federal court. Instead, the Federal Tort Claims Act and the APA both draw the distinction on kinds of claims; neither precludes a lawsuit based on the alienage of the plaintiff. Indeed, as was explained above, aliens have been entitled to access the federal courts since the federal courts were created.

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10. Under the terms of the so-called "Little Tucker Act," the Tucker Act also provides concurrent jurisdiction in U.S. District Courts over claims not exceeding $10,000. 28 U.S.C. § 1346(a)(2).

Finally, there is no reason to discourage lawsuits brought by alien friends against the United States from being brought in U.S. courts. To the extent that such lawsuits are initiated at all, it makes more sense to encourage such lawsuits to be brought in U.S. courts rather than in courts where the aliens reside. Judgments obtained in foreign lands or in specific International courts would likely be unenforceable in the United States, especially money judgments. Therefore, to the extent that the D.C. Circuit's opinion is read as closing the federal courthouse doors to all nonresident aliens the ruling was erroneous.

CONCLUSION

Amici respectfully request that this Court reverse the decision of the D.C. Circuit.

Respectfully submitted,

STEVE W. BERMAN
Counsel of Record
R. BRENT WALTON
HAGENS BERMAN LLP
1301 Fifth Avenue
Suite 2900
Seattle, WA 98101
(206) 623-7292

JONATHAN W. CUNEO
DAVID W. STANLEY
MICHAEL WALDMAN
CUNEO WALDMAN
& GILBERT, LLP
317 Massachusetts Ave., N.E.
Suite 300
Washington, D.C. 20002
(202) 789-3960

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ, LLP
Commerce Bank Center
220 Alhambra Circle
Suite 400
Coral Gables, FL 33134
(305) 357-9004

Attorneys for Amici Curiae

(26) (25)

Nos. 03-334, 03-343

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CENTER FOR JUSTICE AND ACCOUNTABILITY, THE INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, AND INDIVIDUAL ADVOCATES FOR THE INDEPENDENCE OF THE JUDICIARY IN EMERGING DEMOCRACIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

NICHOLAS W. VAN AELSTYN*
WARRINGTON S. PARKER, III
THOMAS P. BROWN
CHRISTIAN E. MAMMEN
ELIZABETH A. BROWN
HELLER EHRMAN WHITE & MCAULIFFE LLP
333 Bush Street
San Francisco, California 94104-2878
415-772-6000 (Telephone)
415-772-6268 (Facsimile)

* *Counsel of Record*

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are the Center for Justice and Accountability and the International League for Human Rights, both non-governmental organizations, and also the individuals Youk Chhang, Benjamin Cuellar, Vojin Dimitrijevic, Tahir Elci, Jakob Finci, Gustavo Gallón, Sudarshana Gunawardana, Chandra Kanagasabai, Mulya Lubis, Lia Mukhashavria, Ahmed Othmani, Dr. Aurora Parong, Dr. Marijan Pavčnik, Naly Pilorge, Carlos Slepoy Prada, Lakshman Kumar Upadhyaya, and Benjamin Hyun Yoon. While *amici* hail from many countries and have diverse backgrounds, all share an interest in defending the rights of individuals against the arbitrary actions of governments, particularly in countries that are emerging as democracies within the community of nations. One of the most important of these rights is the protection of individuals from indefinite detentions. Toward that end, they all recognize that a strong, independent judiciary with the power to review executive action is critical to the defense of individual rights. *Amici* also recognize the profound influence of the examples set by the United States and this Court. Defenders of democracy and human rights in the home countries of all individual *amici* look to the rule of law modeled by the United States. The maintenance and promotion of a strong and independent judiciary is key to the missions to which the institutional *amici* are dedicated, and to the struggles each of the individual *amici* face in their native countries.

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[1] All parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than amici and their counsel contributed monetarily to its preparation or submission.

Institutional *Amici*

The **Center for Justice & Accountability** ("CJA") seeks, by use of the legal systems, to deter torture and other human rights abuses around the world. CJA represents survivors and family members of those who have been killed or who have disappeared in civil suits brought against the perpetrators. CJA's mission is to help survivors and family members to break the silence that surrounds the atrocities committed against them so that they can move forward with their lives, gain hope in the possibility of justice, and ensure that their abusers cannot live in impunity. CJA also defends due process rights for all detainees, as one of the essential minimum protections against torture.

The **International League for Human Rights** (the "League") is America's oldest human rights advocacy organization. Its directors have historically been drawn from human rights advocates in the United States and around the world and have included key authors of the Universal Declaration of Human Rights and most major human rights covenants. The League works with an international network of affiliates and is engaged in building the capacity of human rights advocacy organizations around the world, with special emphasis on the nations in transition and the developing world.

Individual *Amici*

Youk Chhang is the Director of the Documentation Center of Cambodia, which has been at the forefront of documenting the atrocities of the Khmer Rouge era since 1995. Mr. Chhang previously managed and led political, human rights and democracy training programs in Cambodia on democratic institutions for the International Republican

Institute. He was also associated with the Electoral Component of the United Nations Transitional Administration in Cambodia.

Benjamin Cuellar has been the Director of IDHUCA (the Human Rights Institute of the José Simeon Cañas, Central American University of El Salvador) since 1992. Since its founding in 1985, the Institute has actively participated in the denunciation of human rights violations in El Salvador, including such notorious cases as the murders of six Jesuit priests in 1989. The Institute challenges unlawful detentions, works to ensure that the state security forces follow the law, and has been a staunch advocate for the independence and impartiality of the judiciary.

Vojin Dimitrijevic is the Director of the Belgrade Centre for Human Rights. He has written and lectured extensively around the world on human rights issues and political reform in Yugoslavia and Eastern Europe. He taught international law at the University of Belgrade Law School. He is a Judge Ad Hoc on the International Court of Justice in a case concerning the punishment of genocide in Bosnia and Herzegovina. He is also a former Rapporteur and Vice-Chairman of the U.N. Human Rights Committee and former Chairman of the Yugoslav Forum for Human Rights.

Tahir Elci is a lawyer in Turkey and a member of the IHD-Turkish Human Rights Center. He has long been active in bringing human rights complaints on behalf of Kurds and others in Turkey. Mr. Elci has represented many suspects in Turkey's State Security Court, a special court convened to enforce Turkey's anti-terror laws. In 1993, Mr. Elci was detained and tortured by the Turkish authorities because of his work to protect human rights. His case was ultimately heard by the European Court of Human Rights.

Jakob Finci is the head of the Civil Service Agency of Bosnia & Herzegovina and President of the Citizens Association for Truth and Reconciliation. During the Bosnian war of 1992-1995, Mr. Finci served as president of La Benevolencija, a humanitarian society that provided aid to all Bosnian citizens. He was the Executive Director of the Soros Foundation for Bosnia and Herzegovina and vice-president of FONDEKO, a foundation for improvement of the quality of life and sustainable development in Sarajevo.

Gustavo Gallón has been the Director of the Colombian Commission of Jurists ("CCJ") since 1988. He has fought abuses in the criminal justice system, as well as the government's continuous use of states of exception to suspend democratic rights. He was Special Representative for Equatorial Guinea of the United Nations' Human Rights Commission (1999-2002) and has received human rights awards from Human Rights Watch and the Lawyers Committee for Human Rights. CCJ received the International Human Rights Award of the American Bar Association's Litigation Section in 1993.

Sudarshana Gunawardana, an attorney in Sri Lanka, is the Program Coordinator of INFORM, a human rights documentation center in Colombo, and the Secretary General of the Movement for the Defense of Democratic Rights. He is also a member of the Asian Human Rights Commission.

Chandra Kanagasabai is a lawyer based in Singapore who helps secure civil and human rights on behalf of aboriginal and other marginalised people. On behalf of the Commonwealth Lawyers Association, she has trained Malaysian judges, including the Chief Justice, on judicial accountability. She has also co-edited a book on that subject. She has served as the Secretary General of Hakam, Malaysia's Human Rights Association, and has spoken at numerous human rights workshops in Southeast Asia.

Mulya Lubis holds law degrees from Harvard and the University of California, has been a driving force in protecting human rights, as well as in pressing for legal and financial reform, in Indonesia since the 1990s. As a government advisor, he has assisted with the prosecution for corruption of Suharto's colleagues. As a lawyer in private practice, he has represented defendants in some of Indonesia's most visible human rights cases.

Lia Mukhashavria is a lawyer in Georgia. Ms. Mukhashavria, who also holds an LLM from Temple University Law School, handled Georgia's first case before the European Court of Human Rights. She has represented many individuals detained without due process by the Georgian police and local authorities before the European Court of Human Rights. She has also worked closely with USAID, which has helped push for the development of a strong and independent judiciary in Georgia.

Ahmed Othmani was imprisoned in his native Tunisia in 1968 and repeatedly tortured during ten years of detention. After his release from prison, he continued his human rights activism, including by serving as a member of Amnesty International's International Executive Committee and head of the Department of Human Rights Education of the U.N. International Civil Mission in Haiti. In 1989, he helped found Penal Reform International, which has become the largest criminal justice reform NGO in the world, and has served as its Chairperson since 1994. He has written extensively about human rights and the impact of detention without charges on individuals and societies.

Dr. Aurora Parong is the Executive Director of the Task Force Detainees of the Philippines, a national human rights organization which documents cases of human rights violations and assists in the prosecution of perpetrators of such violations. It also assists victims of torture who are detained as suspected terrorists. Dr. Parong is a co-chair of Peace Camp, a coalition of more than 50 organizations and institutions promoting peace based on justice, human rights and the rule of law.

Dr. Marijan Pavčnik is a Professor of Law at the University of Ljubljana in Slovenia. Professor Pavcnik has long advocated on behalf of the rule of law, both before and after the break-up of the former Yugoslavia and since the birth of the new state of Slovenia. He has written and published extensively about legal theory and the rule of law.

Naly Pilorge is the Director of the Cambodian League for the Promotion and Defense of Human Rights (LICADHO). LICADHO was formed in the wake of the 1991 Paris Peace Process that ended the armed conflict in Cambodia. Its mission includes the promotion of the rule of law and human rights principles. LICADHO aims to achieve a democratic society that is peaceful and stable, and whose government and institutions are committed to human rights and social justice.

Carlos Slepoy Prada is originally from Argentina but has resided in Spain for over twenty years. He is one of the founders of the Argentine Association for Human Rights in Madrid. He was a victim of the military repression in Argentina when in 1976, as a law student in Buenos Aires, he was arrested and tortured in the Naval Mechanics School

(the principal torture center of the Argentine dictatorship). He is part of the team of prosecutors in the criminal actions in Spain against members of the military regimes of Argentina, Chile, and Guatemala.

Lakshman Kumar Upadhyaya is a Professor and member of the Law Faculty of Tribhuvan University, Nepal. As Dean of the Law Faculty from 1987 to 1990, he developed, with other colleagues, a course on human rights and humanitarian law for the LL.M. Program. He has written widely on the positive influence of the U.S. Constitution and legal traditions on Nepal's 1990 Constitution and efforts to safeguard judicial independence.

Benjamin Hyun Yoon is a Representative of the Citizens' Alliance for North Korean Human Rights. Mr. Yoon is a former Chairman of the Board of Amnesty International—Korea. He has become the foremost activist working to raise awareness of human rights problems in North Korea, including the plight of political prisoners detained since 1996. In 2003 he received the Democracy Award from the National Endowment for Democracy for his work to bring worldwide attention to the human rights crisis in North Korea.

SUMMARY OF ARGUMENT

For more than two hundred years, this Court has stood as a bulwark against unilateral action by the executive. In so doing, this Court has fulfilled its constitutional obligations. Still more, this Court has helped to make the United States a model for emerging democracies seeking to secure fundamental rights from encroachment by unchecked executive power.

This case threatens to break that fundamental line of defense against the tyranny of executive power. The executive claims that it can put its actions beyond the reach of the judiciary by holding people in the United States Naval Base at Guantánamo Bay, Cuba. This effort to place itself outside judicial control is fundamentally inconsistent with the structure of the U.S. government. The Constitution divides federal power among three co-equal branches, and no branch has the power to eliminate, unilaterally, the power of the others to review and, if necessary, correct its actions. Although this Court has at times deferred to the decisions of the executive and legislature when they act together, it has never abdicated its constitutional obligation to review the unilateral actions of either the executive or the legislature. Domestically, this case therefore represents an important test of this country's commitment to the independence of the judiciary.

This is chiefly, but not solely, a domestic concern. People around the world have long noted that the United States' experiment with a tripartite government and an independent judiciary has, with some notable and regretted missteps, succeeded in living up to the ideals expressed in its Constitution. They have noted that the federal judiciary, specifically this Court, has managed to guarantee civil liberties even in times of strife. This success has made the U.S. system a model for countries around the world, particularly countries seeking to construct a civil society after decades of tyranny and oppression.

However, these attempts to construct civil societies are consistently under assault. And as in this case, often the lead argument for dismantling such systems is national security. Indeed, some would-be democracies already have

begun to justify prolonged detentions without judicial review on the basis of the detentions at Guantánamo Bay.

Amici urge this Court to exercise jurisdiction over the claims asserted by the detainees at Guantánamo Bay not only because it is the only result consistent with more than two hundred years of legal precedent in this country, but also because the people of countries around the world look to the United States to uphold the ideals so elegantly reflected in its Constitution. When the United States fails to live up to these ideals, the cause of individual rights is diminished not just here but everywhere.

ARGUMENT

I. A GOVERNMENT WITH CHECKS AND BALANCES IS ESSENTIAL TO SAFEGUARDING INDIVIDUAL FREEDOMS.

A. For More Than 200 Years, The United States Has Recognized That A Strong, Independent Judiciary Is Essential To The Preservation Of Individual Liberties.

The United States was founded on the ideal that a tripartite system of government was essential to the preservation of freedom. Giving life to the political theories of such philosophers as Locke and Montesquieu, the Framers determined that freedom could only be assured if each branch of the government served as a check on the other. *See* Bernard Bailyn, *The Ideological Origins of the American Revolution* 26-30, 323 (1992); Gordon S. Wood, *The Creation Of The American Republic 1776-1787*, 150-52 (1993). According to Montesquieu, there can be no liberty "if the power of judging is not separate from legislative

power and from executive power . . . . If it were joined to executive power, the judge could have the force of an oppressor." Montesquieu, *The Spirit of the Laws* 157 (1748) (Anne Cohler, et al., eds. (1989)). Echoing Montesquieu, the Framers proclaimed that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison); *see also Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty.").

In this balance, the judiciary, no less than any other branch, ensures that the government of the United States does not, in one fell swoop or by increments, become tyrannical. While the U.S. system of government necessarily contemplates a series of checks and balances, the Framers and this Court recognized that those checks are a dead letter unless exercised. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

While these checks and balances must certainly be exercised in times of peace, they become all the more crucial in times of crisis. The Constitution is not a fair weather document. Its provisions do not allow either the executive or the legislative branches to dismantle it for convenience whatever the threat. "[T]he existence of inherent powers ex necessitate to meet an emergency . . . is something the

forefathers omitted. . . . Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion . . . they made no express provision for exercise of extraordinary authority because of a crisis." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring).

This is so because whatever the perceived threat, at all times "[t]he declared purpose of separating and dividing the powers of government [is] . . . to 'diffus[e] power the better to secure liberty,'" *Bowsher*, 478 U.S. at 721-22. To allow anything less would upset the very nature of the U.S. system of government and threaten individual rights. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866) (the Framers "knew . . . the nation they were founding . . . would be involved in war . . . and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen").

B. Much of the World Has Followed The United States' Lead.

In the two and a half centuries since the Framers advocated for the importance of independent judicial review in preventing oppression and tyranny by an unchecked executive, history has proven them right. First, as discussed in Section II, *infra*, the example of the United States itself has demonstrated that this safeguard works. Second, as discussed in Section III, *infra*, the international conventions adopted by the United Nations and other intergovernmental organizations reflect the nearly universal, if often only aspirational, recognition of these principles by the global community. Finally, as discussed in Section IV, *infra*, the profoundly high regard with which these princi-

ples are held has been most dramatically demonstrated by the efforts and sacrifices of those struggling to establish their emerging democracies as stable, free and just countries within the community of nations.

Thus, the United States' heritage of a-judiciary empowered to check executive power has become more than a national hallmark. It has become a fundamental element of modern governments seeking to ensure individual freedoms. Just as the people of the United States have recognized that a strong judiciary is essential to individual freedoms, so too have the peoples of other nations around the world.

II. IN THE UNITED STATES, THIS COURT HAS ALWAYS EXERCISED JURISDICTION TO ENSURE THAT THE EXECUTIVE'S AUTHORITY TO DEPRIVE INDIVIDUAL RIGHTS IS CHECKED.

Consistent with its role in this system of government, this Court has always protected its role as the final arbiter of the propriety of executive actions. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). At the most basic level, the executive cannot unilaterally determine the scope of this Court's jurisdiction. *See United States v. Nixon*, 418 U.S. 683 (1974) (Supreme Court has power to review President's claim of absolute privilege); *see also Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987) (sovereign immunity doctrine does not permit Congress to preclude judicial review of congressional acts). Even acting together with Congress, the executive cannot usurp the power of the Supreme Court to review the constitutionality of its acts. *Chadha*, 462 U.S. at 941-42. This is as true

when we are at war as when we are peace. *See, e.g., Youngstown*, 343 U.S. 579. Although this Court recognizes that the executive has broad authority to prosecute war and maintain national security, *see, e.g., Ex parte Quirin*, 317 U.S. 1, 10 (1942), this Court has made clear that these powers have judicially circumscribed limits. "[W]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are *judicial* questions." *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (emphasis added); *see also Duncan v. Kahanamoku*, 327 U.S. 304, 321 n.18 (1946) (despite a declaration of "martial law" in the Territory of Hawaii after Japan attacked Pearl Harbor, Hawaiian inhabitants were fully entitled to constitutional protection during trial by military tribunals).

As it had in *Kahanamoku*, this Court curtailed executive action during the Korean conflict. Fearing that an imminent general strike in the steel industry threatened national security, President Truman directed the Secretary of Commerce to seize the steel mills. This Court enjoined the seizure on the grounds that the President did not possess authority under the "war power" to order that an industry be nationalized. *See Youngstown*, 343 U.S. 579.

Questions about the scope of unchecked executive power often arise when the executive insists that it can hold an individual indefinitely without trial, and particularly when the detained invokes the writ of habeas corpus. This Court traditionally has exercised jurisdiction over such challenges, recognizing the writ as a critical tool for checking the abuse of power by the executive. *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing

the legality of Executive detention, and it is in that context that its protections have been strongest."); *Brown v. Allen*, 344 U.S. 443, 533 (1955) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."); *cf.* THE FEDERALIST NO. 84 (Alexander Hamilton) ("[T]he practice of arbitrary imprisonments [has] been, in all ages, the favorite and most formidable instrument[ ] of tyranny.").

Moreover, this Court, notwithstanding the Suspension Clause (U.S. Const. Art. I, § 9, cl. 2), has put limits on the power of the political branches, even when acting together, to suspend the writ. The writ, according to this Court, cannot be suspended at the whim of either the executive or the legislative branch. Rather, this Court has held, even in a time of declared war or martial law, the writ may only be suspended when the courts are closed or when they cannot properly exercise the full limit of their jurisdiction. *Milligan*, 71 U.S. at 127. *See also St. Cyr*, 555 U.S. at 303-14 (Congress' attempt to prevent review by writ of habeas corpus of detention decision in immigration case did not foreclose review of legality of decision to detain).

To be sure, this Court often defers to the executive's decision to deprive people of their liberty, particularly where the executive is simply implementing a Congressional directive. But this Court has not abdicated the power to review executive action. Rather, this Court chooses not to second-guess the executive's decision after satisfying itself that the executive has indeed acted constitutionally and within the scope of legislative authorization. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (reviewing decision of executive branch to criminalize action to determine if authorized by joint resolution of Congress); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (when Congress and the President act together in matters concerning war "it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs"); *see also Korematsu v. United States*, 323 U.S. 214, 217-18 (1945) ("[W]e are unable to conclude that it was beyond the war power of *Congress and the Executive* to exclude those of Japanese ancestry from the West Coast war area .... The military authorities ... ordered exclusion ... *in accordance with Congressional authority* to the military to say who should, and who should not, remain in the threatened areas." (emphasis added)).

This Court has asserted its jurisdiction and protected the writ even where the executive simply detains people not admitted to enter the United States, a sphere in which this Court has concluded the political branches act with plenary power. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), for example, this Court concluded that Mr. Mezei, a noncitizen seeking to enter the United States, was not entitled to full constitutional protections. In deciding not to overturn the executive's decision to exclude and detain Mr. Mezei or even require the executive to disclose its reasons for doing so, this Court did not deny Mr. Mezei the right to challenge his detention through a writ of habeas corpus. *Mezei*, 345 U.S. at 213 ("Concededly, his movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion."). Rather, after implicitly determining that it had jurisdiction, this Court found that the legislature had expressly authorized the executive to do what it had done, noting that the "Attorney General may lawfully exclude [Mr. Mezei] without a hearing *as authorized by the emergency regulations promulgated pursuant*

to the Passport Act." *Id.* at 214-15 (emphasis added). *See also Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (exercising review because, while the legislature had empowered the executive with some discretion, "[t]he aliens here . . . do not seek review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority . . . and the extent of that authority is not a matter of discretion"); *cf. United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

Similarly, in *Ex parte Quirin*, this Court reviewed the executive's decision to detain the defendants—enemy aliens—and, before refusing to grant the requested writ of habeas corpus, determined that the procedures and rights afforded were those provided by the legislative branch. Referring to the Articles of War enacted by Congress, 10 U.S.C. §§ 1471 to 1593, which specifically provided for trial by military courts, this Court determined that the executive was acting pursuant to his powers as Commander in Chief but also "[b]y his Order creating the present Commission . . . has undertaken to exercise the authority conferred upon him by Congress . . . ." 317 U.S. at 28.

In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), this Court did not abdicate to the executive the power of judicial review that it has guarded since *Marbury v. Madison*. Although it found that the *Eisentrager* defendants could not seek habeas relief, this Court only reached that conclusion after noting that the defendants were provided the process specifically prescribed by the legislative branch. *Id.* at 777 (defendants were tried by Military Commissions). In other words, this Court did not deny the *Eisentrager* defendants

a right to review without considering that the defendants were tried by "military tribunals under . . . [the] Articles of War." *Id.* at 797 (Black, J., dissenting). And, as this Court took great pains in *Ex parte Quirin* to note, both the military tribunals and the Articles of War were the result of legislative enactments that provided the executive the authority to use them as it did and set forth the procedures due. 317 U.S. at 25-29. *Eisentrager*, therefore, does not stand for the proposition that the executive is entitled on its own to detain and then determine the process, if any, it considers appropriate. Rather, it stands for the proposition that this Court will not review executive action properly delegated by Congress pursuant to its authority to, among other things, "declare War . . . and make Rules concerning Captures on Land and Water." U.S. Const. Art. I, § 8, cl. 10.

Thus, by its own terms, *Eisentrager* does not apply here. In both *Eisentrager* and *Ex Parte Quirin*, the executive detained prisoners and held military tribunals pursuant to Articles of War that were enacted by Congress.[2] By contrast, here, the executive is acting alone, without authorization from Congress. The legislative branch did not grant the executive the power to hold the Guantánamo detainees

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[2] Congress' September 18, 2001 Joint Resolution does not authorize the Guantánamo Bay detentions. Although it contains broad language authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), nothing in it expressly or even inferentially authorizes the indefinite detentions at Guantánamo Bay. *See Padilla v. Rumsfeld*, __ F.3d __, 2003 WL 22965085, *11-*12, *16-*17 (2d Cir. 2003) (emphasizing need for express Congressional authorization for detentions and rejecting argument that Joint Resolution authorized detention of Padilla).

without any process or judicial review. This Court, therefore, has authority to review these detentions.[3]

III. THE INTERNATIONAL COMMUNITY RECOGNIZES THAT A STRONG, INDEPENDENT JUDICIARY IS ESSENTIAL TO THE PRESERVATION OF INDIVIDUAL FREEDOMS.

After the end of World War II, the nations of the world came together to embrace the rule of law and to declare fundamental norms among the community of nations. To that end, the United Nations was founded. Since its inception, U.N. member countries have adopted or ratified a broad panoply of declarations and treaties. Among the most important are the declarations and treaties directed toward the protection of human rights and fundamental freedoms. Time and again, the community of nations has recognized that judicial review by a strong and independent judiciary is essential to the protection of these rights and freedoms.

The United Nations articulated these shared principles most succinctly in the "Basic Principles on the Independence of the Judiciary," which was adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985, and endorsed by United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Among

[3] *See also Gherebi v. Bush*, __ F.3d __, 2003 WL 22971053, *5-*9 (9th Cir. 2003) (distinguishing *Eisentrager* on the grounds that, unlike the Landsberg Airbase in Germany that was the territory at issue in that case and over which the United States, Great Britain and France exercised joint control, the 1903 lease governing the terms of Guantánamo Bay's territorial relationship to the United States cedes to the U.S. alone "complete jurisdiction and control").

the basic principles it articulated was the following: "3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law." *Available at* http://www.hfhrpol.waw.pl/EN-RTF/en-5-5.htm (viewed Jan. 8, 2004).

The Universal Declaration of Human Rights, which is one of the foundational documents of modern international law and was modeled in part on the U.S. Bill of Rights, specifically enunciates the right to "full equality to a fair and public hearing by an independent and impartial tribunal." U.N.G.A. Res. 217A (III), U.N. Doc. A/810, at 71, *adopted* 10 Dec. 1948, Article 10. The United States voted for its adoption, and Congress reaffirmed its commitment to it on its 50th anniversary in 1998. *See* http://usinfo.state.gov/journals/itdhr/1098/ijde/perspect.htm#congress. Similarly, the International Convention on Civil and Political Rights (the "ICCPR"), to which the United States is a party, provides that a hearing "by a competent, independent and impartial tribunal established by law" is a fundamental element of minimum due process. 999 U.N.T.S. 171, 175, Dec. 16, 1966. *See also* ICCPR Art. 9, §§ 1-4 *available at* http://austlii.law.uts.edu.au/au/other/media.OLD/8246.html (viewed Jan. 8, 2004).

According to Dato' Param Cumaraswamy, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, an "autonomous, independent, impartial and effective judicial system is a prerequisite for a democracy in which respect for and promotion of human rights are guaranteed." Roman Wieruszewski, *Seminar on the Interdependence Between Democracy and Human Rights*, U.N. Treaty Bodies and Special Procedures and the Strengthen-

ing of Democracy, Office of the High Comm. for Human Rights, at 16 (25-26 Nov. 2002, Geneva). The Special Rapporteur also has observed that among the "essential elements of the right to democracy" are the "rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary." *Id.* at 3, *available at* http://www.unhchr.ch/democracy/D-Wieruszewski.pdf (viewed Jan. 8, 2004).

Other intergovernmental organizations also have consistently affirmed the importance of an independent judiciary. This is reflected in provisions of the Charter of the Organization of American States,[4] the American Convention on Human Rights,[5] the African Charter on Human and Peoples' Rights,[6] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[7] the Convention on Human Rights and Fundamental Freedoms of the

[4] OAS Treaty Series, Nos. 1-C and 61, U.N.T.S., No. 1609, Vol. 119, *entered into force* April 30, 1948.

[5] O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *signed* 22 November 1969, *entered into force* 18 July 1978 (art. 3: right to recognition before the law; art. 7: right to liberty, due process, and judicial review; art. 8: right to hearing with due process guarantees).

[6] O.A.U. Doc. CAB/LEG/67/3 Rev.5, *adopted* 27 June 1981, *entered into force* 21 October 1986 (art. 6: right to liberty; art. 7(1): right to have cause heard; art. 7(1)(b): presumption of innocence; art. 7(1)(d): right to be tried within reasonable time by impartial tribunal).

[7] 213 U.N.T.S. 221, *signed* 4 November 1950, *entered into force* 3 February 1953 (providing for judicial review in article 5(3)-(4)). In *Ocalan v. Turkey*, Appl. No. 46221/99, 37 Eur. H.R. Rep. 10 (March 2003), the European Commission on Human Rights found a violation of the European Convention on Human Rights when an applicant was not brought before a judge within seven days of his arrest to determine the propriety of his detention.

Commonwealth of Independent States,[8] and the Copenhagen Document, developed by the Conference for Security and Co-operation in Europe.[9] The signatories to the Copenhagen Document committed "to support and advance those principles of justice which form the basis of the rule of law."[10]

Nor is the international community unaware of the dangers a country confronts when faced with a hostile neighbor. However, the U.N. Human Rights Committee has declared that even in times of emergency a state 'may not depart from the requirement of effective judicial review of detention.' Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARVARD INT'L. L. J. 503, 509 (2003) (*quoting* U.N. Human Rights Comm., General Comment No. 29, at 11, 16, and n. 9, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001)).

IV. A STRONG, INDEPENDENT JUDICIARY IS ESSENTIAL TO THE PROTECTION OF INDIVIDUAL FREEDOMS AND THE ESTABLISHMENT OF STABLE GOVERNANCE IN EMERGING DEMOCRACIES AROUND THE WORLD.

A. Individual Nations Have Accepted and Are Seeking to Implement Judicial Review By A Strong, Independent Judiciary.

Many of the newly independent governments that have proliferated over the past five decades have adopted these

[8] Council of Europe doc. H(95)7 rev (1995).

[9] Copenhagen Document, ¶¶2, 3, 29 June 1990, 29 I.L.M. 1305, *available at* http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm (viewed Jan. 8, 2004).

[10] *Id.*

ideals. They have emerged from a variety of less-than-free contexts, including the end of European colonial rule in the 1950's and 1960's, the end of the Cold War and the breakup of the former Soviet Union in the late 1980's and 1990's, the disintegration of Yugoslavia, and the continuing turmoil in parts of Africa, Latin America and southern Asia. Some countries have successfully transitioned to stable and democratic forms of government that protect individual freedoms and human rights by means of judicial review by a strong and independent judiciary. Others have suffered the rise of tyrannical and oppressive rulers who consolidated their hold on power in part by diminishing or abolishing the role of the judiciary. And still others hang in the balance, struggling against the onslaught of tyrants to establish stable, democratic governments.

In their attempts to shed their tyrannical pasts and to ensure the protection of individual rights, emerging democracies have consistently looked to the United States and its Constitution in fashioning frameworks that safeguard the independence of their judiciaries. *See* Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 92 (2000) (stating that of the "[m]any countries . . . [that] have engaged in fundamental constitutional reform over the past three decades," nearly all adopted "a bill of rights and establishe[d] some form of active judicial review"). Establishing judicial review by a strong and independent judiciary is a critical step in stabilizing and protecting these new democracies. *See* Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 605-06 (1996) (describing the judicial branch as having "a uniquely

important role" in transitional countries, not only to "mediate conflicts between political actors but also [to] prevent the arbitrary exercise of government power; *see also* Daniel C. Prefontaine and Joanne Lee, *The Rule of Law and the Independence of the Judiciary*, International Centre for Criminal Law Reform and Criminal Justice Policy (1998) ("There is increasing acknowledgment that an independent judiciary is the key to upholding the rule of law in a free society . . . . Most countries in transition from dictatorships and/or statist economies recognize the need to create a more stable system of governance, based on the rule of law."), *available at* http://www.icclr.law.ubc.ca/Publications/Reports/RuleofLaw.pdf (viewed Jan. 8, 2004). Although the precise form of government differs among countries, "they ultimately constitute variations within, not from, the American model of constitutionalism . . . [a] specific set of fundamental rights and liberties has the status of supreme law, is entrenched against amendment or repeal . . . and is enforced by an independent court . . . ." Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 718 (2001).

This phenomenon became most notable worldwide after World War II when certain countries, such as Germany, Italy, and Japan, embraced independent judiciaries following their bitter experiences under totalitarian regimes. *See id.* at 714-15; *see also United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) ("Since World War II, many countries have adopted forms of judicial review, which—though different from ours in many particulars—unmistakably draw their origin and inspiration from American constitutional theory and practice. *See generally* Mauro Cappelletti, *The Judicial Process in Com-*

parative Perspective (Oxford: Clarendon Press, 1989).”). It is a trend that continues to this day.

It bears mention that the United States has consistently affirmed and encouraged the establishment of independent judiciaries in emerging democracies. In September 2000, President Clinton observed that “[w]ithout the rule of law, elections simply offer a choice of dictators. . . . America’s experience should be put to use to advance the rule of law, where democracy’s roots are looking for room and strength to grow.” Remarks at Georgetown University Law School, 36 Weekly Comp. Pres. Doc. 2218 (September 26, 2000), *available at* http://clinton6.nara.gov/2000/09/2000-09-26-remarks-by-president-at-georgetown-international-law-center.html. The United States acts on these principles in part through the assistance it provides to developing nations. For example, the United States requires that any country seeking assistance through the Millenium Challenge Account, a development assistance program instituted in 2002, must demonstrate, among other criteria, an “adherence to the rule of law.” The White House noted that the rule of law is one of the “essential conditions for successful development” of these countries. *See* http://www.whitehouse.gov/infocus/developingnations (viewed Jan. 8, 2004).[11]

[11] The United States encourages other countries to develop independent judiciaries through other aspects of American foreign policy as well. It has, for example, conditioned the continuation of trade benefits to certain countries where the protection of human rights has come into doubt, such as Swaziland, on their maintenance of the rule of law and the independence of the judiciary. *See, e.g.*, “Employers lash out at Swazi government, demand return to rule of law,” Agence France Presse, *available at* 2002 WL 23671087, December 13, 2002. Similarly, in June 2002, President Bush declared that United States support for a Palestinian state depends in part on Palestinian adoption of an independent judiciary. White House Press Release, June 24, 2002, *available at* http://www.whitehouse.gov/news/releases/2002/06/200206243.html.

A few examples illustrate the influence of the United States model. On November 28, 1998, Albania adopted a new constitution, representing the culmination of eight years of democratic reform after the communist rule collapsed. In addition to protecting fundamental individual rights, the Albanian Constitution provides for an independent judiciary consisting of a Constitutional Court with final authority to determine the constitutional rights of individuals. Albanian Constitution, Article 125, Item 1 and Article 128; *see also* Darian Pavli, “A Brief ‘Constitutional History’ of Albania” *available at* http://www.ipls.org/services/others/chist.html (viewed Jan. 8, 2004); Jean-Marie Henckaerts & Stefaan Van der Jeught, *Human Rights Protection Under the New Constitutions of Central Europe*, 20 LOY. L.A. INT’L & COMP. L. REV. 475 (Mar. 1998).

In South Africa, the new constitutional judiciary plays a similarly important role, following generations of an oppressive apartheid regime. South Africa adopted a new constitution in 1996. Constitution of the Republic of South Africa, Explanatory Memorandum. It establishes a Constitutional Court which “makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional.” *Id.* at Chapter 8, Section 167, Item (5), *available at* http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1 (viewed Jan. 8, 2004); *see also* Justice Tholakele H. Madala, *Rule Under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary*, 26 N.C. J. INT’L L. & COM. REG. 743 (Summer 2001).

Afghanistan is perhaps the most recent example of a country struggling to develop a more democratic form of government. Adoption by the Loya Jirga of Afghanistan's new constitution on January 4, 2004 has been hailed as a milestone. *See* http://www.cbsnews.com/stories/2004/01/02/world/main591116.shtml (Jan. 7, 2004). The proposed constitution creates a judiciary that, at least on paper, is "an independent organ of the state," with a Supreme Court empowered to review the constitutionality of laws at the request of the Government and/or the Courts. Afghan Const. Art. 116, 121 (unofficial trans.), *available at* http://www.hazara.net/jirga/AfghanConstitution-Final.pdf (viewed Jan. 8, 2004). *See also* Ron Synowitz, Afghanistan: Constitutional Commission Chairman Presents Karzai with Long-Delayed Draft Constitution (Nov. 3, 2003), *available at* http://www.rferl.org/nca/features/2003/11/03112003164239.asp (viewed Jan. 8, 2004).

B. Other Nations Have Curtailed Judicial Review During Times Of Crisis, Often Citing the United States' Example, And Individual Freedoms Have Diminished As A Result.

While much of the world is moving to adopt the institutions necessary to secure individual rights, many still regularly abuse these rights. One of the hallmarks of tyranny is the lack of a strong and independent judiciary. Not surprisingly, where countries make the sad transition to tyranny, one of the first victims is the judiciary. Many of the rulers that go down that road justify their actions on the basis of national security and the fight against terrorism, and, disturbingly, many claim to be modeling their actions on the United States.

Again, a few examples illustrate this trend. In Peru, one of former President Alberto Fujimori's first acts in seizing control was to assume direct executive control of the judiciary, claiming that it was justified by the threat of domestic terrorism. He then imprisoned thousands, refusing the right of the judiciary to intervene. International Commission of Jurists, *Attacks on Justice 2000-Peru*, Aug. 13, 2001, *available at* http://www.icj.org/news.php3?id_article=2587&lang=en (viewed Jan. 8, 2004).

In Zimbabwe, President Mugabe's rise to dictatorship has been punctuated by threats of violence to and the co-opting of the judiciary. He now enjoys virtually total control over Zimbabweans' individual rights and the entire political system. R.W. Johnson, *Mugabe's Agents in Plot to Kill Opposition Chief*, Sunday Times (London), June 10, 2001; International Commission of Jurists, *Attacks on Justice 2002-Zimbabwe*, Aug. 27, 2002, *available at* http://www.icj.org/news.php3?id_article=2695&lang=en (viewed Jan. 8, 2004).

While Peru and Zimbabwe represent an extreme, the independence of the judiciary is under assault in less brazen ways in a variety of countries today. A highly troubling aspect of this trend is the fact that in many of these instances those perpetuating the assaults on the judiciary have pointed to the United States' model to justify their actions. Indeed, many have specifically referenced the United States' actions in detaining persons in Guantánamo Bay.

For example, Rais Yatim, Malaysia's "de facto law minister" explicitly relied on the detentions at Guantánamo to justify Malaysia's detention of more than 70 suspected Islamic militants for over two years. Rais stated that

Malaysia's detentions were "just like the process in Guantánamo," adding, "I put the equation with Guantánamo just to make it graphic to you that this is not simply a Malaysian style of doing things." Sean Yoong, "Malaysia Slams Criticism of Security Law Allowing Detention Without Trial," Associated Press, Sept. 9, 2003 (*available from Westlaw at* 9/9/03 APWIRES 09:34:00).

Similarly, when responding to a United States Government human rights report that listed rights violations in Namibia, Namibia's Information Permanent Secretary Mocks Shivute cited the Guantánamo Bay detentions, claiming that "the US government was the worst human rights violator in the world." BBC Monitoring, Mar. 8, 2002, *available at* 2002 WL 15938703.

Nor is this disturbing trend limited to these specific examples. At a recent conference held at the Carter Center in Atlanta, President Carter, specifically citing the Guantánamo Bay detentions, noted that the erosion of civil liberties in the United States has "given a blank check to nations who are inclined to violate human rights already." Doug Gross, "Carter: U.S. human rights missteps embolden foreign dictators," Associated Press, Nov. 12, 2003 (*available from Westlaw at* 11/12/03 APWIRES 00:30:26). At the same conference, Professor Saad Ibrahim of the American University in Cairo (who was jailed for seven years after exposing fraud in the Egyptian election process) said, "Every dictator in the world is using what the United States has done under the Patriot Act . . . to justify their past violations of human rights and to declare a license to continue to violate human rights." *Id.*

Likewise, Shehu Sani, president of the Kaduna, Nigeria-based Civil Rights Congress, wrote in the *International Herald Tribune* on September 15, 2003 that

> [t]he insistence by the Bush administration on keeping Taliban and Al Quaeda captives in indefinite detention in Guantánamo Bay, Cuba, instead of in jails in the United States—and the White House's preference for military tribunals over regular courts—helps create a free license for tyranny in Africa. It helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso.

Available at http://www.iht.com/ihtsearch.php?id=109927&owner=(IHT)&date=20030121123259.

In our uni-polar world, the United States obviously sets an important example on these issues. As reflected in the foundational documents of the United Nations and many other such agreements, the international community has consistently affirmed the value of an independent judiciary to the defense of universally recognized human rights. In the crucible of actual practice within nations, many have looked to the United States model when developing independent judiciaries with the ability to check executive power in the defense of individual rights. Yet others have justified abuses by reference to the conduct of the United States. Far more influential than the words of Montesquieu and Madison are the actions of the United States. This case starkly presents the question of which model this Court will set for the world.

CONCLUSION

Much of the world models itself after this country's two hundred year old traditions—and still more on its day to day implementation and expression of those traditions. To say that a refusal to exercise jurisdiction in this case will have global implications is not mere rhetoric. Resting on this Court's decision is not only the necessary role this Court has historically played in this country. Also at stake are the freedoms that many in emerging democracies around the globe seek to ensure for their peoples.

DATED: January 14, 2004

Respectfully submitted,

HELLER EHRMAN WHITE
& MCAULIFFE LLP

NICHOLAS W. VAN AELSTYN
WARRINGTON S. PARKER, III
THOMAS P. BROWN
CHRISTIAN E. MAMMEN
ELIZABETH A. BROWN

Attorneys for Amici Curiae

(97) (26)

Nos. 03-334 and 03-343

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

SHAFIQ RASUL, et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,

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v.

UNITED STATES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF LEGAL HISTORIANS LISTED HEREIN IN SUPPORT OF THE PETITIONERS

MICHAEL J. WISHNIE
Professor of Clinical Law
NEW YORK UNIVERSITY
SCHOOL OF LAW
245 Sullivan Street
New York, NY 10012
(212) 998-6471

DANIEL J. HULSEBOSCH
Assistant Professor
SAINT LOUIS UNIVERSITY
SCHOOL OF LAW
3700 Lindell Boulevard
St. Louis, MO 63108
(314) 977-3308

JAMES OLDHAM
Counsel of Record
St. Thomas More
Professor of Law &
Legal History
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9090

*AMICI**

SIR J.H. BAKER
Downing Professor of the Laws of England
ST. CATHARINE'S COLLEGE
UNIVERSITY OF CAMBRIDGE
England

MARY BILDER
Associate Professor of Law
BOSTON COLLEGE LAW SCHOOL
885 Centre Street
Newton, MA 02459

BARBARA A. BLACK
George Welwood Murray Professor of Legal History
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

DR. PAUL BRAND
Senior Research Fellow
ALL SOULS COLLEGE
UNIVERSITY OF OXFORD
England

SARAH H. CLEVELAND
Marrs McLean Professorship in Law
UNIVERSITY OF TEXAS SCHOOL OF LAW
727 East Dean Keeton Street
Austin, TX 78705

JAMES S. COCKBURN
Professor of History Emeritus
UNIVERSITY OF MARYLAND
2115 Francis Scott Key Hall
College Park, MD 20742

CHRISTINE DESAN
Professor of Law
HARVARD LAW SCHOOL
1563 Massachusetts Avenue
Cambridge, MA 02138

CHARLES DONAHUE
Paul A. Freund Professor of Law
HARVARD LAW SCHOOL
1563 Massachusetts Avenue
Cambridge, MA 02138

LAWRENCE M. FRIEDMAN
Marion Rice Kirkwood Professor of Law
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305

ROBERT W. GORDON
Chancellor Kent Professor of Law & Legal History
YALE LAW SCHOOL
Box 208215
New Haven, CT 06520

---

* Affiliations of *amici* and their counsel listed for identification purposes only.

SARAH BARRINGER GORDON
Professor of Law and History
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
3400 Chestnut Street
Philadelphia, PA 19104

THOMAS A. GREEN
John Philip Dawson Collegiate
Professor of Law
UNIVERSITY OF MICHIGAN
LAW SCHOOL
625 South State Street
Ann Arbor, MI 48109

PAUL D. HALLIDAY
Associate Professor of History
UNIVERSITY OF VIRGINIA
P.O. Box 400180 –
Randall Hall
Charlottesville, VA 22904

HENDRIK A. HARTOG
Class of 1921 Bicentennial
Professor of the History of
American Law & Liberty
214 Dickinson Hall
PRINCETON UNIVERSITY
Princeton, NJ 08544

DANIEL J. HULSEBOSCH
Assistant Professor
SAINT LOUIS UNIVERSITY
SCHOOL OF LAW
3700 Lindell Boulevard
St. Louis, MO 63108

NASSER HUSSAIN
Assistant Professor of Law,
Jurisprudence & Social
Thought and History
Clark House
AMHERST COLLEGE
Amherst, MA 01002

STANLEY N. KATZ
Professor of Public &
International Affairs
WOODROW WILSON SCHOOL
PRINCETON UNIVERSITY
Princeton, NJ 08544

EBEN MOGLEN
Professor of Law
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

WILLIAM E. NELSON
Judge Edward Weinfeld
Professor of Law
NEW YORK UNIVERSITY
SCHOOL OF LAW
Vanderbilt Hall
40 Washington Square South
New York, NY 10012

JAMES OLDHAM
St. Thomas More Professor of
Law & Legal History
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

JONATHAN ROSE
Professor of Law & Willard
H. Pedrick Distinguished
Research Scholar
ARIZONA STATE UNIVERSITY
COLLEGE OF LAW
McAllister & Orange Streets
P.O. Box 877906
Tempe, AZ 85287

DAVID J. SEIPP
Professor of Law
BOSTON UNIVERSITY
SCHOOL OF LAW
765 Commonwealth Avenue
Boston, MA 02215

A.W. BRIAN SIMPSON
Charles F. and Edith J.
Clyne Professor of Law
UNIVERSITY OF MICHIGAN
LAW SCHOOL
625 South State Street
Ann Arbor, MI 48109

T. ROBERT TRAVERS
Assistant Professor of History
HARVARD UNIVERSITY
Robinson Hall
35 Quincy Street
Cambridge, MA 02138

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STATEMENT OF INTEREST[1]

This case raises the question of whether the federal courts have jurisdiction to review *habeas corpus* petitions filed by "next friends" of persons detained by the United States at the United States Naval Base at Guantánamo Bay, Cuba ("Guantánamo"). *Amici curiae* are professors of legal history at law schools and universities in the United States and England with expertise in English legal history prior to 1789 and/or early American legal history. The professional interest of *amici curiae* legal historians is in ensuring that the Court is fully and accurately informed respecting the historical precedent, understandings, and evidence regarding the history of English law and the scope and availability of the writ of *habeas corpus* that, under this Court's precedents, are properly considered in evaluating the issues raised under the Suspension Clause of the United States Constitution and the statutory codification of the writ. The people whose lives and writings *amici curiae* study, including the generation that drafted this country's Constitution, were steeped in the common law tradition, including the principles governing the extension of English law to new territories in the British empire and the writ of *habeas corpus*, which they considered a great bulwark of personal freedom and check on arbitrary executive power. Unquestionably, the Framers, educated in English law, drew on this common law framework when they prohibited suspension of the writ. *Amici curiae* have no personal, financial, or other professional interest, and take no position respecting any other issues raised in the cases below, including the merits of the underlying claims for relief of each detainee or the proper venue or custodian for a *habeas* action.

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[1] *Amici* state that Jonathan L. Hafetz, Esq., an associate at the law firm of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., which is counsel to petitioners in the case at bar, is the author in part of the herein brief. *Amici* state that no person or entity other than *amici* and their counsel made any monetary contribution to its preparation. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Sup. Ct. R. 37.

SUMMARY OF ARGUMENT

Petitioners are "next friends" of Australian, British, and Kuwaiti citizens confined at Guantánamo who seek to test the lawfulness of that Executive Branch detention, including on the ground that the detainees have been wrongly classified as "enemy aliens." Each detainee was apparently captured by United States forces in Afghanistan or neighboring countries and has remained in custody for over two years. In their petitions for a writ of *habeas corpus*, the "next friends" asked a United States district court to exercise jurisdiction and determine the lawfulness of the detainees' confinement. The "next friends" asserted that the federal *habeas* statute and the Suspension Clause of the Constitution prohibit the denial of all *habeas corpus* review of the prisoners' detention at Guantánamo.

The government responded that the detainees may be held indefinitely by the Executive Branch, in territory long subject to the exclusive jurisdiction and control of the United States, without review of any claim by any court. The district court and the U.S. Court of Appeals for the District of Columbia Circuit agreed with the government and declined to exercise jurisdiction to inquire into the merits of the claims raised in the petitions. The Solicitor General contends that this conclusion is consistent with the federal *habeas corpus* statute and the Constitution, because (1) mid twentieth-century precedent "preclude[s] the availability of the Great Writ to aliens held abroad,"[2] and (2) these are "'enemy aliens' . . . seized in the course of active and ongoing hostilities against United States and coalition forces."[3] In effect, the government maintains that the Suspension Clause places no constraints whatsoever on creating a prison that is outside the law but inside territory over which the U.S. has long exercised complete jurisdiction and control, and where no other nation's laws are operative.

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[2] Gov't Br. to U.S. Court of Appeals for the District of Columbia Circuit, at 13.

[3] *Id.* at 31.

As to the first point, in the government's view the writ is and historically has been territorially limited, running only to persons situated in lands subject to formal United States sovereignty: "sovereignty, not malleable notions of control or use, is the dispositive factor."[4] The indefinite lease for Guantánamo, executed between the United States and Cuba in 1903, cedes to the United States "complete jurisdiction and control" of the base, until both parties shall agree otherwise, but reserves to Cuba "ultimate sovereignty." The Solicitor General acknowledges that "Cuban courts clearly cannot hear [the detainees'] claims."[5] He nevertheless reasons that, because Guantánamo is ultimately subject to Cuban sovereignty, neither the federal *habeas* statute nor the common law writ known to the Framers and guaranteed under the Constitution is available to non-citizens there.

Secondly, the government asserts that the judiciary has no authority, on *habeas corpus* or otherwise, to review this Executive Branch determination. Whatever rights are possessed by the Guantánamo detainees, argues the Solicitor General, "the scope of those rights [is] to be determined by political and military authorities, *not by the courts*."[6]

The historical evidence set forth below suggests, however, that the common law writ of *habeas corpus*, known to the Framers and incorporated into the Suspension Clause of the Constitution, would have been available to challenge the "enemy" status of individuals detained in a territory, like Guantánamo, that has been firmly under this country's exclusive jurisdiction and control for over a century.[7] Indeed, the vastness of the Great Writ's reach was

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[4] *Id.* at 22; *see also* Gov't Opp. Cert. at 15 (same).

[5] Gov't Br. to D.C. Cir. at 43.

[6] *Id.* at 43-44 (internal quotation marks omitted and emphasis added); *see also* Gov't Opp. Cert. at 14 (classification as "enemy alien" is "a quintessential political question" and courts should "respect the actions of the political branches")

[7] *Amici* take no position on whether the historical evidence suggests that the writ of *habeas corpus* would have been available under the different circumstances presented in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Johnson*, this

not merely understood by 1789, but had been so long recognized that no one could have imagined that matters might be otherwise.[8] This was the understanding of Sir Edward Coke, the great common law justice revered by the Founders, as well as of other leading English jurists. Such historical evidence has long been considered by the Court as important in interpreting the Great Writ's availability and scope as guaranteed by the Suspension Clause and federal *habeas* statutes.[9]

1. Well established principles governed the operation of English law in new territories. These principles increasingly constrained executive authority and helped ensure that no lands under British control, not even lands conquered by force, would exist without law. Some version of *habeas corpus*, including the common law writ familiar to the Founding generation, formed part of the king's justice and the "ancient constitution" that

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Court held that German enemy prisoners detained in Landsberg Prison in Germany, and previously tried, convicted, and sentenced by a military commission in Nanking for offenses committed in China after the unconditional surrender of Germany at the end of World War II, could not obtain *habeas* relief in the federal courts. The nature and scope of U.S. control over Landsberg Prison was different than its century-long total and exclusive control over Guantánamo, as the former involved, *inter alia*, a temporary military occupation and shared control with other nations.

[8] *E.g.*, J.H. Baker, 6 *The Oxford History of the Laws of England* 94 (2003) (from its origins as an assertion of the prerogative of the crown, the writ was employed by courts by the mid sixteenth-century as "an effective means of curbing arbitrary power, whether exercised by ministers of the Crown or by any other person exercising an authority or jurisdiction which deprived a subject of his liberty").

[9] *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 301-05 (2001); *Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring) ("The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted."); *see also Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830) (Marshall, C.J.); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.) ("for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law"); H. Friendly, "Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments," 38 *U. Chi. L. Rev.* 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers. . . .").

accompanied the extension of English law to these lands, and writs were issued by local courts in territories throughout the British empire. It was clear well before 1789 that *habeas corpus* possessed a broad territorial ambit based on its nature as a prerogative writ and a guarantor of individual liberty, and that an English court's determination of whether it could issue the writ beyond the realm turned primarily on the crown's control over the territory and the ability of English judges to enforce the writ, not the particular label ascribed to the territory. The scope of the writ's protections, moreover, enabled even detained "enemy aliens" to challenge the lawfulness of that classification on *habeas*.

2. The history of *habeas corpus* followed a similar path in the American colonies and the early United States. The common law writ was in operation throughout the thirteen American colonies by the time of the Revolution. The Framers, steeped in the common law tradition, viewed *habeas corpus* as a preeminent safeguard of individual liberty and check on arbitrary executive power, and guaranteed the Great Writ's continued availability in the Constitution, subject only to suspension by Congress under narrowly defined circumstances. As in England, the writ's protections were not limited by the nationality of the subject, and did not exclude *habeas* petitions that challenged the threshold question of a detainee's alleged "enemy alien" legal status.

In short, contrary to the government's assertions that formal sovereignty is "the dispositive factor" in determining the availability of the writ, and that "enemy alien" status is determined exclusively by "political and military authorities," the historical evidence indicates that the common law writ of *habeas corpus* secured by the Constitution was available to persons held in executive detention, in lands over which the national government had fully consolidated power and control, and further that the scope of review of the writ included challenges to a prisoner's "enemy alien" classification.

ARGUMENT

I.

THE AVAILABILITY OF THE COMMON LAW WRIT OF *HABEAS CORPUS* IN TERRITORIES THROUGHOUT THE BRITISH EMPIRE

A. *The Operation of English Law Overseas*

Before describing the wide availability of the writ of *habeas corpus* in English-controlled territories, this Part examines the basic principles that ensured no land was without law and that have guided the extension of English law to newly conquered or settled lands since they were first articulated by Chief Justice Coke in *Calvin v. Smith*.[10] There, Coke divided conquered territories into two types – "Christian" and "infidel."[11] Upon conquest, the king could abrogate the native laws of "infidel" lands because they were "not only against Christianity, but against the law of God and nature, contained in the decalogue," and until "certain laws [were] established among them," the king could govern such lands "according to natural equity."[12] In contrast, the laws of a conquered "Christian" people would remain in force until the king, as conqueror, activated English law in the conquered land.[13] Once English law had been made operational, however, no subsequent king could unilaterally alter the law without the consent of

[10] 77 Eng. Rep. 377 (K.B. 1608). *Calvin's Case* was heard before all the common law judges of England in Exchequer Chamber. These principles continued to develop in the centuries that followed. *See generally* E. Brown, *British Statutes in American Law, 1776-1836* (1964).

[11] 77 Eng. Rep. at 397-98.

[12] *Id.* at 398. English courts had cast doubt on this exception for "infidel" lands by the 1770s. *See, e.g., Campbell v. Hall*, 98 Eng. Rep. 1045, 1047-48 (K.B. 1774) ("[T]he absurd exception as to pagans, mentioned in *Calvin's Case*, shows the universality and antiquity of the maxim. For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Crusades.").

[13] *Calvin*, 77 Eng. Rep. at 398.

Parliament.[14] Coke's opinion influenced the extension of English law to new lands, and provided a basis for imposing further constraints on royal power.[15]

While the extension of English statutes enacted after the established date of conquest or settlement required more specific authorization by Parliament, core common law principles became available upon some signal from the king of his intent to activate English law.[16] Under these rules, English common law became operational in places populated by English settlers like the mainland American colonies and the West Indies,[17] as well as in what were essentially military garrisons like Gibraltar, conquered from Spain in the early 1700s.[18]

[14] *Id.*

[15] *See* D. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," 21 *Law & Hist. Rev.* 439, 461 (2003); *see also* 1 W. Blackstone, *Commentaries*, *107 ("[I]n conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.") (citing *Calvin*); M. Hale, *The History of the Common Law of England* 117 (1755) (extension of common English law to Ireland); J. Smith & T. Barnes, *The English Legal System: Carryover to the Colonies* 6-7 (1975) ("Under the concepts of *Calvin's Case*, if the King put into effect the laws of England for the government of a conquered Christian kingdom, no succeeding king could alter them without an act of Parliament.").

[16] *See, e.g., R. v. Vaughan*, 98 Eng. Rep. 308, 311 (K.B. 1769) (English common law extended by crown proclamation).

[17] *See, e.g.*, "Richard West [Counsel to the Board of Trade] on English Common and Statute Law in Settled Colonies" (June 20, 1720), *reprinted in* 2 F. Madden & D. Fieldhouse, *The Classical Period of the First British Empire, 1689-1783*, at 192 (1985); *Anonymous* ("Privy Council Memorandum"), 24 Eng. Rep. 646 (P.C. 1722); A.B. Keith, *Constitutional History of the First British Empire* 186 (1930); V. Newton, *Commonwealth Caribbean Legal Systems: A Study of Small Jurisdictions* 22, 26 (1988) (principles of extension of English law shaped the legal systems of countries throughout the Caribbean).

[18] *See Jephson v. Riera*, 12 Eng. Rep. 598, 606-07 (P.C. 1835) (rights of inhabitants of Gibraltar to be determined according to English law upon its substitution for law of Spain); *see also R. v. Brampton*, 103 Eng. Rep. 782, 785 (K.B. 1808) (Ellenborough, C.J.) (suggesting that English law could govern

In short, no territory under English control remained without the rule of law.[19] And, once English law had been activated, the king could not alter it without legislative consent. Writing on the eve of the American Revolution in *Campbell v. Hall*,[20] Lord Mansfield refused to sustain the Crown's claim that a duty had lawfully been imposed on the export of sugar from Grenada, which had previously been conquered by Britain from France. Mansfield acknowledged the king's power to impose English statutes, but found that prior proclamations extending English law (a right to assembly) prevented subsequent unilateral imposition by the king of a new law (a tax without legislative consent).[21] *Campbell* thus represents the increasing limits courts placed on the royal prerogative to alter an existing system of law even in conquered countries.

Campbell further demonstrates how this framework had come to exist alongside certain overarching legal norms. As Lord Mansfield stated, even within the king's sphere of power as conqueror he could introduce no change "contrary to fundamental principles."[22] Similarly, the following year Mansfield sustained an action by a "native" from the military colony of Minorca against the military governor for false imprisonment and banishment without trial.[23] In rejecting the governor's sweeping assertions of

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action over estate by widow of deceased British Army officer in Santo Domingo, a foreign country occupied by British troops; but concluding that marriage would have been valid under either English or local law).

[19] *Compare Blankard v. Galdy*, 87 Eng. Rep. 356, 361-62 (K.B. 1691) (local laws in Jamaica, a Christian country conquered from Spain, remained in force), *with Calvin*, 77 Eng. Rep. at 398 (once English law extended to Ireland following conquest, it could not be altered by any subsequent king absent consent of Parliament).

[20] 98 Eng. Rep. 1045 (K.B. 1774).

[21] *Id.* at 1050.

[22] *Id.* at 1048. It was, ironically, the violation of such fundamental principles that shortly thereafter caused the Founders to rebel against English rule and, in turn, led them to enact safeguards against the arbitrary exercise of executive power in their own constitution.

[23] *Fabrigas v. Mostyn*, 20 Howell's State Trials 81 (K.B. 1775).

absolute executive power, Mansfield cautioned that "to lay down in an English court of justice such monstrous propositions as that a governor . . . can do what he pleases . . . and to maintain here that every governor in every place can act absolutely; that he may spoil, plunder, affect [the people's] bodies and their liberty, and is accountable to nobody -- is a doctrine not to be maintained; for if he is not accountable in this court, he is accountable nowhere."[24]

Such were the general principles of extension at the Founding. By analogy to the case at bar, the president could initially have carried forward Spanish law in Cuba or altered it by extending U.S. law there after the United States "conquered" Cuba from Spain[25] and was then granted complete control over Guantánamo Bay.[26] There is no question that Spanish law as it existed in 1898 has been fully displaced. Nor can there be any suggestion that Cuban law has operated at Guantánamo since 1903.[27] Instead, U.S. law was long ago activated in Guantánamo, and remains the *only* law operational there, governing both civil[28]

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[24] *Id.* at 231.

[25] The Treaty of Peace concluded between Spain and the United States on December 18, 1898 relinquished Spanish sovereignty over Cuba and allowed for U.S. occupation of the island. *See* Treaty of Peace, Dec. 10, 1898, U.S.-Spain, art. I, 30 Stat. 1754.

[26] In 1902, the United States recognized the independence of Cuba, and in 1903 signed a lease agreement with Cuba giving the U.S. "complete jurisdiction and control over and within" the territory at Guantánamo Bay. *See* Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418. The United States may continue to exercise this total and exclusive control over Guantánamo for as long as it chooses, *see* Treaty between the United States and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866, and has consistently insisted that it may remain there indefinitely under the agreement. *See* G. Neuman, "Anomalous Zones," 48 *Stan. L. Rev.* 1197, 1197-98 (1996).

[27] Gov't Br. to D.C. Circuit at 43 (government acknowledgment that "Cuban courts clearly cannot hear [the detainees'] claims").

[28] *See Huerta v. United* States, 548 F.2d 343, 344, 346 (Ct. Claims) (assuming court may adjudicate breach of contract and takings clause claims by Cuban national for loss of property situated on Guantánamo), *cert. denied.*, 434 U.S. 828 (1977); Neuman, "Anomalous Zones," *supra*, at 1228.

and criminal matters,[29] including offenses committed by non-U.S. nationals.[30] Under the basic principles of extension familiar to the Founding generation, once U.S. law had been activated in Guantánamo, no President could alter those laws without the consent of Congress.

As explained more fully below, the writ of *habeas corpus* was a special case within the main body of English common law and its extension principles. Central authorities in England had long maintained, and settlers in colonial America adamantly demanded, that the operation of English law in new territories necessarily included certain core principles of royal power and the "ancient constitution," including the common law writ of *habeas corpus* known to the Framers and guaranteed by them under the Suspension Clause. The Framers would thus have expected that the extension of U.S. law to a U.S. enclave like Guantánamo would necessarily have meant that *habeas corpus* be available to those detained there.

B. *The Extension of the Common Law Writ of* Habeas Corpus *to Territories Beyond the Realm of England*

From its origins as an expression of royal power to its evolution into the fundamental safeguard of liberty, the writ of *habeas corpus* has long provided the means to test the legality of an individual's detention. First, the principles governing the extension of English law, and the belief that core elements of English justice like the common law writ of *habeas corpus* must be

[29] *See United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (trial of U.S. citizen for acts done in course of employment on Guantánamo). The extension of U.S. law to Guantánamo was almost immediate. *See, e.g.*, Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. IV, T.S. No. 426 (providing, *inter alia*, that "fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within said areas, taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities").

[30] *See United States v. Lee*, 906 F.2d 117, 117 n.1 (4th Cir. 1990) (trial of Jamaican national for acts committed on Guantánamo).

available in places under English control, led local courts to issue the writ in a wide spectrum of territories, whether dominions, plantations, or even the merchant trading posts originally known as "factories."

Second, the King's Bench in Westminster increasingly asserted its authority to issue writs of *habeas corpus* directly to persons detained in territories overseas, particularly where a territory lacked local courts capable of issuing and enforcing the writ. As a mandatory or prerogative writ,[31] *habeas corpus* has long occupied a unique place in the Anglo-American legal tradition. Distinguishing it from other common law writs, Blackstone described *habeas corpus* as "the great and efficacious writ, in *all* manner of illegal confinement."[32]

1. The Power of Local Courts throughout English-controlled Territories to Issue the Common Law Writ of *Habeas Corpus*

During the 1700s, *habeas corpus* was widely available in overseas territories and local courts possessed the power to issue the writ. For example, the common law writ was confirmed by the crown in instructions to the governors of Barbados, the Bahamas, and St. John in the West Indies, as well as Nova Scotia on the mainland.[33] The common law writ was also available in Jamaica by the eighteenth century.[34] While the crown originally chose to continue local Spanish law in Trinidad following its conquest from Spain, the initial activation of English law in 1830 included the writ of *habeas corpus*.[35]

[31] Both terms are used to describe *habeas corpus*.

[32] 3 W. Blackstone, *Commentaries* *131 (emphasis added).

[33] Instruction Nos. 464 & 466, *in* 1 *Royal Instructions to British Colonial Governors* 334-38 (L. Labaree ed. 1967) (instructions to Barbados in 1702, Bahamas in 1729, St. John in 1769, and Nova Scotia in 1749).

[34] *See* 2 Madden & Fieldhouse, *supra*, at 450 n.2.

[35] *See* K.W. Patchett, "Reception of Law in the West Indies," 1973 *Jamaica L.J.* 17, 26.

The crown's actions in Quebec on the eve of the American Revolution similarly demonstrate that *habeas corpus* was viewed as so fundamental that it should operate even in a conquered land in which other core elements of the ancient constitution -- common law property tenures and a local assembly -- were avoided (the former at least for French settlers).[36] The crown instructed the Quebec governor to allow the common law writ of *habeas corpus* to issue from Quebec's courts because it represented such a fundamental principle of English law.[37]

The writ was even available in territories held by merchant companies like the British East India Company pursuant to a grant of authority from the English crown. Initially established in the late seventeenth century as "factories" or trading posts along the coast of India, these companies gradually expanded their presence and control through fortified settlements.[38] By 1765, the East India Company had become a substantial military power, with *de facto* control over large territories beyond its coastal factories.[39] In 1773, English law generally became operational in the East India

[36] *See* Quebec Act of 1774, 14 Geo. 3, c. 83, art. 12 (describing non-elective legislative council); *id.* arts. 3 & 10 (continuing French land tenure law); *id.* art. 9 (addressing British land grants).

[37] *See* Instruction No. 467, *in* 1 *Royal Instructions to British Colonial Governors*, *supra*, at 338 ("Security to personal liberty is a fundamental principle of justice in all free government and the making due provision for that purpose is an object the legislature of Quebec ought never to lose sight of; nor can they follow a better example than that which the common law of this kingdom hath set in the provision made for a writ of habeas corpus, which is the right of every British subject in this kingdom."); *see also* D. Clark & G. McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* 20 & n. 90 (2000) (common law writ of *habeas corpus* available in Quebec, even though writ not specifically named by statute).

[38] *See generally, e.g.*, A.B. Keith, *A Constitutional History of India, 1600-1935*, at 24-25 (1969).

[39] P.J. Marshall, "The British in Asia: Trade to Dominion, 1700-1765," *in* 2 *The Oxford History of the British Empire* 487, 503 (P.J. Marshall ed. 1998) (East India Company became "outright ruler" of limited areas in the province of Bengal).

Company's territories,[40] and a supreme court was established at Calcutta.[41] By 1775, judges were issuing writs of *habeas corpus*,[42] without any explicit statutory authorization.[43] Writs were issued for the benefit not only of British subjects but non-subjects or "natives" as well.[44] Judges issued writs of *habeas corpus* to prevent imprisonment without trial resulting from the arbitrary exercise of power,[45] and custodians who disobeyed the writ's commands could be held in contempt.[46] The Chief Justice understood his authority to issue writs of *habeas corpus* to be

[40] *E.g.*, L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, at 136 (2002).

[41] Regulating Act of 1773, 13 Geo. 3. c. 63, § 13.

[42] *E.g.*, N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* 81 (2003) (first writ issued in 1775 on behalf of Kemaluddin Khan, also known as Abdul Muhammad Kamal, a revenue collector detained by East India Company over issue of late payments); T. Curley, *Sir Robert Chambers: Law, Literature, and Empire in the Age of Johnson* 241 (1998) (second writ issued in Kamal case by Judge Chambers to ensure rule of law after faulty return to first writ); *see also R. v. Ramgovind Mitter* (Sup. Ct., Calcutta 1781) (opinion of Chambers, J.), 1 *The Indian Decisions* 1008 (T.A. Venkasawmy Row ed. 1911) (common law power of individual judges to issue writs of *habeas corpus*); *R. v. Hastings* (Sup. Ct., Calcutta 1775) (opinion of Impey, C.J.), 1 *The Indian Decisions*, *supra*, at 1005, 1007 (same).

[43] The Regulating Act of 1773 did not specifically authorize the supreme court to issue writs of *habeas corpus*. *See* 13 Geo. 3. c. 63, §§ 13-14 ; *see also* Clark & McCoy, *supra*, at 21 n.96.

[44] *E.g.*, B.N. Pandey, *The Introduction of English Law into India* 151 (1967) (writ issued in 1777 on behalf of Indian arrested and confined without trial by local criminal court in Bengal, outside Calcutta).

[45] *Id.* at 17.

[46] *See, e.g.*, *Ramgovind Mitter* (opinion of Hyde, J.), 1 *The Indian Decisions*, *supra*, at 1009 (routine practice to enforce custodian's non-return to writ of *habeas corpus*); *In re Coza Zachariah Khan* (Sup. Ct., Calcutta 1779), *reported in* 1 W.H. Morley, *An Analytical Digest of all The Reported Cases Decided in the Supreme Court of Judicature in India* 277 (1850) ("The Judge who issued the writ [of *habeas corpus*] may grant an attachment for disobedience . . . either in term or in vacation."); Pandey, *supra*, at 233 ("[Judges] challenged the power of the [East India] Company's servants to imprison a person indefinitely without bail or trial . . . . [by] issuing writs of *Habeas Corpus* and holding a punishment for contempt of Court to those who disregarded the writs.").

derived from the principle, articulated by Blackstone, that this high prerogative writ extended to all parts of the king's dominions to test the legality of imprisonment.[47] This exercise of *habeas corpus* jurisdiction became an instrument for the extension of "fundamental principles" of English law and justice to these British-controlled territories in India.[48]

Importantly, judicial power to issue writs of *habeas corpus* in India did *not* turn on the existence of formal sovereignty. To the contrary, Britain intentionally delayed assertions of formal sovereignty over the range of territories controlled by the East India Company until 1813[49] – nearly *four decades* after judges had begun issuing writs of habeas corpus on behalf of individuals detained by Company officials in those same lands.[50] Moreover,

[47] *See* Hussain, *supra*, at 81 & 164 n.36 (citing Chief Justice Impey to the Lord Chancellor, "Observations on the Administration of Justice in Bengal" (Sept. 20, 1776) (British Museum Add. MS. 16,265, fol. 235)).

[48] *Id.* at 80 (internal quotation marks omitted); Pandey, *supra*, at 17 (court's issuance of writs of *habeas corpus* reduced arbitrary exercise of power by company officials); *see also* Curley, *supra*, at 593 n.57 (by 1775, support of first governor-general of India, Warren Hastings, for issuing writs of *habeas corpus* where custodian was under authority of East India Company).

[49] 4 *The Cambridge History of the British Empire* 595 (Dodwell, H.H. ed. 1929); *see also id.* at 605 ("Down to [1813] the British assertion of sovereignty within the Company's possessions had been spasmodic and incomplete."); *see* Act of 1813, 53 Geo. 3, c. 155.

[50] Even after Parliament began to narrow the Calcutta supreme court's *habeas* jurisdiction in 1781, *see, e.g.*, Act of 1781, 21 Geo. 3, c. 70, § 8 (curtailing supreme court's jurisdiction over matters concerning revenue collection), the court continued to issue writs of *habeas corpus*. *See, e.g., In re Muddoosooden Sandell* (Sup. Ct., Calcutta 1815), *reported in* 2 Morley, *supra*, at 29; *Rajah Mohinder Deb Rai v. Ramcanai Cur.* (Sup. Ct., Calcutta 1794), *reported in* 1 Morley, *supra*, at 277 (issuing writ and discharging Indian prisoner detained by order of provincial court, upon request of defendant in suit before Calcutta supreme court after prisoner had given evidence supporting plaintiffs in said suit). A separate supreme court established at Madras in 1801, *see* M.P. Jain, *Outlines of Indian Legal History* 125 (1952), likewise continued to issue writs of *habeas corpus*. *See, e.g., R. v. Nagapen* (Sup. Ct., Madras 1814), *reported in* 1 Morley, *supra*, at 278 (writ issued on behalf of mother to obtain possession of her illegitimate infant unlawfully in putative father's custody); *R. v. Monisse*, (Sup. Ct., Madras 1810), *reported in* 1 Morley, *supra*, at 278.

the Mughal emperor had continued to assert ultimate sovereignty,[51] and British authorities in Britain and India had continued to avoid claims of formal sovereignty,[52] long after English law had been made operational and local judges had started issuing writs of *habeas corpus* on behalf of those, for instance, situated outside Calcutta.[53] Indeed, during the decades after the first writ was granted in India, "the relations between the [East India] Company's government in [Bengal] and the Moghul emperor" remained one, respectively, of "the *de facto* and the *de jure* wielders of Indian dominion."[54]

In sum, to crown officials in both the center and periphery, *habeas corpus*, the preeminent symbol of royal power and safeguard against arbitrary imprisonment, signified the rule of law and English justice. Accordingly, local courts issued some form of *habeas corpus*, even on behalf of non-subjects, in English-controlled territories over which the crown had not formally asserted sovereignty.

[51] 4 *The Cambridge History of the British Empire* at 592 ("formal sovereignty" lay with the Moghul emperor, but existing alongside the emperor and his local governors was the East India Company, which "possessed the sole military force" in the region).

[52] *Id.*

[53] *See, e.g., Rajah Mohinder, supra, reported in* 1 Morley, *supra*, at 277; Pandey, *supra*, at 151 (writ issued in 1777 on behalf of person detained by officers of Dacca Council, provincial council in east Bengal composed of British servants of East India Company); *id.* at 140 (writ issued in 1777 on behalf of person detained by head of local government and military at provincial city of Murshidabad); Curley, *supra*, at 245 ("The Court would continue to honor applications for habeas corpus from anybody . . . who was imprisoned by a company servant outside Calcutta.") (internal quotation marks omitted); *see also Monisse, supra, reported in* 1 Morley, *supra*, at 278 (issuing writ beyond Madras) ("A *habeas corpus* will lie to release persons improperly deprived of their liberty by the Nabob of the Carnatic (an independent native prince).").

[54] 4 *The Cambridge History of the British Empire, supra*, at 593; *see also* H.V. Bowen, "British India, 1765-1813: The Metropolitan Context," *in* 2 *The Oxford History of the British Empire, supra*, at 530, 547 (Act of 1813 and its assertion of "'undoubted sovereignty' over all the Company's territories . . . . add[ed] the *de jure* sovereignty of the Crown to the *de facto* sovereignty that had long been exercised by the Company.") (quoting 53 Geo. 3, c. 155).

2. The Power of Central English Courts to Issue the Common Law Writ of *Habeas Corpus* to Territories Overseas

As a mandatory writ that "commands the production of [an aggrieved subject], and inquires after the cause of his imprisonment,"[55] *habeas corpus* has always had a broad territorial reach. Cases dating from as early as the seventeenth century demonstrate that the common law writ ran from central English courts not only to so-called "exempt" jurisdictions within the realm,[56] where the ordinary writs used in civil suits did not run,[57]

[55] John Eardley Wilmot, *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 36 (H.L. 1758); *see id.* at 44; *Anonymous*, 86 Eng. Rep. 230 (K.B. 1681); Rolle, 2 *Un Abridgment des Plusiers Cases et Resolutions del Common Ley* 69 (1668) ("[T]he king *must have an account* made to him of the liberty of subjects and of the restraint of them.") (emphasis added); *see also R. v. Patrick*, 84 Eng. Rep. 103, 107 (K.B. 1667) ("mandatory writ [of *habeas corpus*] must be obeyed").

[56] *See, e.g., Alder v. Puisy*, 89 Eng. Rep. 10 (K.B. 1671) (writ issued to Dover, formerly a Cinque Port town); *Bourn's Case*, 79 Eng. Rep. 465, 466 (K.B. 1619) (same); *Harrison's Case, sub nom. Jobson's Case*, Latch 160, 82 Eng. Rep. 325 (K.B. 1626) (writ issued to Durham, formerly a County Palatine; writs previously issued to Calais and Bordeaux as early as fourteenth century); *Harrison's Case*, Harvard L. Sch. MS 5016, fol. 80 (Commonplace Book of Thomas Twisden) (noting Judge Dodderidge's reference to writs of *habeas corpus* issued to Berwick by early 1600s); *Sir Matthew Hale's The Prerogative of the King* 207 (The Publications of the Selden Society, vol. 92) (Yale, D.E.C., ed., London: Bernard Quaritch, 1975) (broad reach of the writ to such exempt jurisdictions "hath been often resolved, partly in respect of the interest the king hath in his subject, partly in respect there is no other means to examine whether his commitment be legal").

[57] *E.g.*, 3 W. Blackstone, *Commentaries* *79 ("[A]ll prerogative writs [including *habeas corpus*] may issue . . . to all these exempt jurisdictions; because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king.") (footnotes omitted); *see also* R.J. Sharpe, *The Law of Habeas Corpus* 183 (1976) ("The privilege of [old exempt] jurisdictions . . . to determine disputes between parties within their jurisdiction . . . could not prevent the royal prerogative calling for an account of the imprisonment of a subject from having full force.").

but also to dominions beyond the realm.[58] Refusing to accept any claims of jurisdictional immunity, English courts routinely threatened to sanction,[59] and on occasion imprisoned,[60] custodians for failing to make a return to the writ. Courts were concerned with enforcing the writ to prevent "a failure of justice,"[61] not with parsing the formal legal status of the territory where an individual was detained.

The principles that had long governed the Great Writ's broad territorial reach were forcefully articulated by Lord Mansfield in *R. v. Cowle* in 1759.[62] Mansfield rejected the assertion that a common law writ of *habeas corpus* would not run to the town and borough of Berwick, a territory that had undergone a "metamorphosis" from Scottish to English control, becoming a

[58] *See, e.g., R. v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (writ issued to Channel Island of Jersey on behalf of individual committed on "suspicion of treason"); *R. v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (writ issued to Jersey); Hale, *The History of the Common Law*, *supra*, at 120 (writ issues to Channel Islands because "the King may demand, and must have an Account of the Cause of any of his Subjects Loss of Liberty"); *see also Bourn's Case*, 79 Eng. Rep. at 466 (reported more fully at Lincoln's Inn, MS Maynard 22, fol. 406v.) (writ issued to Calais when formerly subject to king of England); M. Bacon, *A New Abridgement of the Law*, Tit. Habeas Corpus (B) (7th ed. 1832) (same); 3 W. Blackstone, *Commentaries* *131 ("high prerogative writ" of *habeas corpus* "run[s] into all parts of the king's dominions; for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, *wherever that restraint may be inflicted*") (footnotes omitted) (emphasis added).

[59] *E.g., Pettit's Case*, PRO, KB21/12, fols. 102v. & 107 (K.B. 1638) (issuing 200£ subpoena to Mayor of Sandwich in Cinque Ports to compel return to writ); *see also Brearley's Case*, PRO, KB21/2, fols. 84v, 87 & 95 (K.B. 1600-1601) (issuing subpoena to compel return to writ by mayor and corporation of Berwick).

[60] *Witherley's Case*, Harvard L. Sch. MS 118, fol. 57 and MS 1180, fol. 68v; KB21/2, fol. 166v. and KB21/3, fols. 24-32v. (K.B. 1605) (fining and imprisoning jailor for non-return of writ issued to Marches of Wales).

[61] *Rickaby's Case*, Harvard L. Sch. MS 1166, fol. 273 (K.B. 1641-1642) (non-return from Palatine of Durham not permitted); *see also* Wilmot, *Opinion on the Writ of Habeas Corpus*, *supra*, 97 Eng. Rep. at 42 (enforcement of common law writ by attachment).

[62] 97 Eng. Rep. 587 (K.B. 1759).

corporate dominion of England[63] even though "no part of the realm of England."[64] He concluded that there was "no doubt as to the power [of the King's Bench]" to issue writs of *habeas corpus* "where the place is *under the subjection* of the Crown of England."[65] Acknowledging the longstanding principle that a writ of *habeas corpus* would not run to Scotland,[66] Lord Mansfield nevertheless maintained that the writ would run to territories beyond the realm, including to the Isle of Man, the "plantations" (the mainland American colonies and the West Indies), and the Channel Islands of Jersey and Guernsey, and observed that the writ had previously run to the conquered territory of Calais.[67] The decision to issue the writ turned principally on whether the court could "judge of the cause" or "give relief upon it."[68] In such instances, *habeas corpus* was "the properest and most effectual remedy."[69]

Cowle thus made explicit that the writ's extension beyond the realm turned on the degree of the crown's control over the particular territory and its power to secure obedience to the writ's command. As there were no local courts capable of issuing *habeas corpus* in Berwick, the refusal of the King's Bench to extend the writ there would have led to the perverse conclusion that a territory

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[63] *Id.* at 599.

[64] *Id.* at 598.

[65] *Id.* at 599 (emphasis added).

[66] *Id.* at 600. Although the thrones of England and Scotland had been joined since 1603 and the countries joined politically under the Act of Union of 1707, Scotland retained a high degree of independence, including its own legal and religious systems, and had a writ analogous to *habeas corpus*. *See generally* "Note on the Power of the English Courts to Issue the Writ of Habeas Corpus," 8 *Jurid. Rev.* 157, 158 (1896) (monarchies of England and Scotland united, but Scotland, formerly an independent nation, not "subject to the crown of England").

[67] *Cowle*, 97 Eng. Rep. at 600.

[68] *Id.*

[69] *Id.*

under English control was entirely without the protections of the Great Writ.[70]

In sum, the writ of *habeas corpus*, in one form or another, became operational once the crown had consolidated its control over a territory.[71] To claim that *habeas corpus* does not extend to a territory over which United States has long exercised complete control and jurisdiction but lacks "ultimate sovereignty" is to turn the common law understanding of the Great Writ on its head: "sovereignty" itself was increasingly understood as existing precisely where the king's mandatory writs could be issued and enforced. *Amici* are unaware of any case before 1789 in which the common law writ of *habeas corpus* was held *not* to extend to territory under the crown's exclusive control and jurisdiction. To the contrary, English courts historically resolved any questions about the writ's territorial reach in favor of its availability, and it was only a legislative act explicitly curtailing the writ[72] that could place the executive detention of those imprisoned on territory within the crown's total and exclusive control beyond all *habeas corpus* review.

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[70] *Id.* at 598 ("The people of Berwick have not jura regalia . . . [and] have no sovereign Courts of the King within themselves . . . ."); *see also Ex parte Anderson*, 121 Eng. Rep. 525, 526-27 (Q.B. 1861) (Cockburn, C.J.) ("At the time of the decision in *Rex v. Cowle* . . . Berwick was not subject to the laws of Scotland. There was, consequently, no superior Court with power to control proceedings instituted there, unless the superior Courts of Westminster had jurisdiction to do so.") (internal citation omitted).

[71] These conclusions regarding the writ's territorial ambit fully support the conclusion of the Brief for the Commonwealth Lawyers Association as *Amicus Curiae* in Support of Petitioners, at 2-3.

[72] *See generally* Sharpe, *supra*, at 91-92 (acts of Parliament during seventeenth and eighteenth centuries suspending writ for those accused or suspected of treason and similar offenses).

C. *The Ability of Alleged "Enemy Aliens" to Obtain Review of their Classification by Writ of* Habeas Corpus

The writ of *habeas corpus* has historically served that most basic function of ensuring the committing authority has jurisdiction over the person detained.[73] Where an individual is imprisoned pursuant to executive rather than judicial command, the writ's protections have been at their strongest.[74] Indeed, the writ of *habeas corpus* has traditionally provided a remedy to executive detention when there otherwise would have been none. [75]

At common law, the writ's protections encompassed both aliens and citizens (or subjects),[76] and even the former were able to challenge the jurisdictional fact of their "enemy" status on *habeas*.[77] In *R. v. Schiever*,[78] for example, the court adjudicated the *habeas* petition of an alien from a neutral nation (Sweden), who had been captured aboard an enemy French privateer during a

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[73] *See, generally, e.g.*, W. Church, *A Treatise on the Writ of Habeas Corpus*, § 222, at 311 (2d ed. 1893) ("The question of jurisdiction, in the commitment of persons for either civil or criminal matters is always open and may be inquired into upon proceedings by habeas corpus.").

[74] *St. Cyr*, 533 U.S. at 301.

[75] *See, e.g., Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (*habeas corpus* challenging sailor's impressment into the navy); *R. v. White*, 20 Howell's State Trials 1376, 1377 (K.B. 1746) (granting *habeas corpus* relief to impressed seaman who had "no other remedy"); *see also* A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 219 (8th ed. 1927) (*habeas* review of impressment of sailors by the Admiralty reflected a "very notorious instance of judicial authority in matters most nearly concerning the executive").

[76] *See Somerset's Case,* 20 Howell's State Trials 1, 79-82 (K.B. 1772) (discharging African slave, purchased in Virginia and detained on ship prepared to depart for Jamaica); *see also Case of the Hottentot Venus,* 104 Eng. Rep. 344, 344 (K.B. 1810) (reviewing *habeas* petition of "female native of South Africa").

[77] *See generally* Sharpe, *supra*, at 113-14.

[78] 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759). A second report of *R. v. Schiever* was published anonymously in Kenyon's Reports. *See* 2 Keny. 473, 96 Eng. Rep. 1249 (K.B. 1759).

war between England and France.[79] Although the court ultimately denied relief, it first reviewed the petition to determine the petitioner's legal status, concluding that he was in fact a prisoner of war and therefore lawfully detained.[80]

In the *Three Spanish Sailors' Case*,[81] the prisoners had been seized from a Spanish privateer and, after being carried to Jamaica, persuaded to enter a merchant vessel on promise of wages and immediate release upon arrival in England, in exchange for English prisoners. Once in England, however, the ship's captain refused to pay their wages or release them, instead turning them over to an English warship as prisoners of war. Although the court refused to discharge the prisoners based on what it acknowledged was the captain's misconduct, it did so only after noting that the prisoners, "upon their own showing, are alien enemies and prisoners of war, and therefore not entitled to . . . be set at liberty on a habeas corpus."[82]

Even outside the *habeas* context, English courts consistently determined the threshold question of an individual's "enemy alien" status before denying him access to the courts on that basis. *Sylvester's Case*[83] for example, demonstrates that even though enemy aliens were generally barred from suit, courts would review an assertion by a plaintiff that he did not fall within that category.[84] In *Sparenburgh v. Bannatyne*[85] the court engaged in an extensive analysis to adjudicate whether a native of a neutral nation captured amid hostilities on board the ship of an enemy nation was in fact an "alien enemy," and therefore barred from

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[79] 97 Eng. Rep. at 551.

[80] *Id.* at 552.

[81] 96 Eng. Rep. 775 (C.P. 1779).

[82] *Id.* at 776.

[83] 87 Eng. Rep. 1157 (K.B. 1703).

[84] *Id.* (question whether alleged enemy alien has Queen's protection and thus can bring suit is reviewable if pled).

[85] 126 Eng. Rep. 837 (C.P. 1797).

bringing suit.[86] In framing the issue, Chief Justice Eyre stated that threshold questions of "enemy" status are always reviewable: "The question is [w]hether . . . the Plaintiff is to be considered as an alien enemy . . . . *If* he must be so considered, I take it to be a necessary consequence that this action must fail."[87] Cases involving the right of enemy aliens to bring suit further underscore the principle that has long governed the Great Writ's operation: courts will exercise review of the threshold question of an individual's "enemy" status before foreclosing all consideration of the merits of his claim.

II.

THE AVAILABILITY OF *HABEAS CORPUS* IN COLONIAL AMERICA AND THE WRIT'S INCORPORATION INTO THE SUSPENSION CLAUSE

A. *The Availability of* Habeas Corpus *in Colonial America and under the U.S. Constitution*

Crown officials increasingly authorized and sanctioned the use of *habeas corpus* in the American colonies,[88] and the colonists themselves demanded the writ's protections against the arbitrary exercise of executive power. Although the procedural reforms provided by the Habeas Corpus Act of 1679[89] were not explicitly

[86] *Id.* at 840-41 (opinion of Eyre, C.J.).

[87] *Id.* at 840 (emphasis added). Chief Justice Eyre acknowledged that the plaintiff, a neutral by birth, was properly characterized as an "alien enemy" when captured, based upon his seizure on board an enemy ship amid actual hostilities, but nonetheless concluded that this status was "temporary" and that the plaintiff had earned the right to be removed from it based on his subsequent conduct. *Id.* at 840-41.

[88] N. Cantor, "The Writ of Habeas Corpus: Early American Origins and Development," *in Freedom and Reform: Essays in Honor of Henry Steele Commager* 55, 69 (H. Hyman & L. Levy eds. 1967).

[89] 31 Car. 2, c. 2. The 1679 act remedied certain procedural flaws in the common law writ, for example, by mandating that a return be made within a date certain, *id.* § 2, and imposing sanctions on the custodian for his failure to do so. *Id.* § 5. The act did not apply to non-criminal detention, which remained

extended to all the colonies,[90] the common law writ remained widely available during the colonial period and was operating in all thirteen British colonies that rebelled in 1776.[91] In practice, moreover, judges employed the procedures of the 1679 act "as a matter of course."[92] When local courts denied relief against crown officials, they did so on the merits, and there was no question that the common law writ was generally available to those who sought it.[93]

The Framers viewed the writ of *habeas corpus* as a fundamental safeguard in their new republic, just as it had been a

subject to challenge by the common law writ in both America and England. *See generally, e.g.*, 6 *Encyclopedia of the Laws of England* 132 (A.W. Renton ed. 1898) ("[T]he Habeas Corpus Act, 1679, applies only to cases of detention or imprisonment for criminal or supposed criminal offences . . . without in any way infringing on the common law jurisdiction of the Courts or judges.").

[90] W. Duker, *A Constitutional History of Habeas Corpus* 115 (1980) (by American Revolution, procedural reforms of 1679 act had been made available in Virginia, North Carolina, South Carolina, and Georgia).

[91] *See, e.g.*, Duker, supra, at 115; A.H. Carpenter, "Habeas Corpus in the Colonies," 8 *Am. Hist. Rev.* 18, 21, 26 (1902); *see also* Duker, *supra*, at 107-08 (failed attempt to establish *habeas corpus* statute in Maryland, but continued availability of common law writ); *id.* at 102 (same in Massachusetts); Keith, *Constitutional History of the First British Empire*, *supra*, at 184-85 (English law regulating relations between crown and subject, including "the right to freedom from arbitrary imprisonment, and its enforcement by the writ of Habeas Corpus," insisted upon by colonists, was available through common law writ).

[92] Z. Chafee, Jr., "The Most Important Human Right in the Constitution," 32 *B.U.L. Rev.* 143, 146 (1952).

[93] *See, e.g.*, E. Washburn, *Sketches of the Judicial History of Massachusetts* 105-06 (1840) (denying *habeas* relief in 1687 to Reverend John Wise and other Ipswich residents accused of "contempts and high misdemeanor" for refusing to pay tax without local consent and ordering prisoners to stand trial) (internal quotation marks omitted); Carpenter, *supra*, at 22 (although writ was "arbitrarily" refused to Reverend Wise, there was "nothing in the incident . . . to indicate that that there was anything new in the asking for such a writ"); *see also* J. Oldham & M. Wishnie, "*The Historical Scope of Habeas Corpus and* INS v. St. Cyr," *16 Geo. Immig. L.J.* 485, 496-99 (2002) (debate over fate of Acadian refugees expelled from France in 1750s and detained by colonial authorities in South Carolina suggests writ's availability).

core liberty available in other parts of the British empire. That *habeas corpus* was the only common law process explicitly incorporated into the Constitution demonstrates the degree to which it was operational in the colonies and the high esteem in which it was held.[94] The limited discussion of the writ at the Constitutional Convention of 1787 and during the ratification debates reflected a broad consensus about the writ's important place in the Constitution.[95] Indeed, to the extent there was any debate among the Framers, it was over what conditions, if any, could ever justify the suspension of *habeas corpus* by Congress.[96]

B. *The Ability of Alleged "Enemy Aliens" to Obtain Review of their Classification by Writ of* Habeas Corpus *in the United States*

Consistent with the English practice noted above, non-citizens in the Founding era enjoyed the protections of *habeas corpus* under U.S. law.[97] The writ, moreover, was available to individuals detained by the executive on even the most serious

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[94] Cantor, *supra*, at 55, 74; *see also The Federalist* 84, at 511 (Alexander Hamilton) (C. Rossiter ed., 1961) (writ of *habeas corpus* is among the "greate[st] securities to liberty and republicanism").

[95] *See, e.g.*, F. Paschal, "The Constitution and Habeas Corpus," 1970 *Duke L.J.* 605, 608 ("[I]n the Philadelphia Convention and in the struggle for ratification, there was never the slightest objection to according a special preeminence to the Great Writ.").

[96] *Compare* 2 *The Records of the Federal Convention of 1787*, at 438 (M. Farrand ed. 1966) (support for "securing the benefit of the Habeas corpus in the most ample manner" and for not permitting its suspension except "on the most urgent occasions, and then only for a limited time") (proposal of Charles Pinckney) (internal quotation marks omitted), *with id.* (support "for declaring the Habeas Corpus inviolable") (proposal of John Rutledge).

[97] *See, e.g., United States v. Villato*, 28 F. Cas. 377, 378-79 (Cir. Ct. D. Pa. 1797) (releasing non-citizen charged with treason); *Ex parte D'Olivera*, 7 F. Cas. 853, 854 (Cir. Ct. D. Mass. 1813) (Story, J., on circuit) (releasing Portuguese sailors arrested as alleged deserters); *Wilson v. Izard*, 30 F. Cas. 131, 131-32 (Cir. Ct. D. N.Y. 1815) (adjudicating *habeas* petition by British enlistees who claimed, *inter alia*, that as "alien enemies" they were ineligible to serve in military).

charges,[98] including those confined in military custody who challenged the military's lack of jurisdiction over them.[99]

Similarly, alleged "enemy aliens" have been able to seek review of their legal status on *habeas corpus*. Early on, courts adjudicated *habeas* petitions challenging detention under the Alien Enemies Act of 1798,[100] which authorized the president to detain alien enemies in time of war. In *Lockington's Case*,[101] for instance, a majority of the judges of the Pennsylvania Supreme Court held that a British citizen detained during the War of 1812 could challenge the legality of his detention on *habeas corpus* and, reaching the merits, remanded him to custody.[102] While the third justice refused to reach the merits, he nonetheless recognized that the prisoner could still have challenged his status as an alien

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[98] *Bollman*, 8 U.S. at 135 (discharging prisoners committed for treason); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 17-18 (1795) (bailing prisoner accused of treason); *Villato*, 28 F. Cas. at 378-79 (discharging prisoner accused of treason).

[99] *See, e.g., In re Stacy*, 10 Johns. 328, 333-34 (N.Y. 1813) (Kent, C.J.) (discharging petitioner who claimed that, as private citizen, military lacked jurisdiction to try him for treason); *see also United States v. Bainbridge*, 24 F. Cas. 946, 951-52 (Cir. Ct. D. Mass. 1816) (Story, J., on circuit) (review on *habeas* of legality of enlistment of minor); *Commonwealth v. Cushing*, 11 Mass. 67, 71 (Mass. 1814) (same); *Commonwealth v. Harrison*, 11 Mass. 63, 66 (Mass. 1814) (discharging Russian minor over whom army lacked lawful custody); E. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 27-28 & 165 n.55 (2001) (citing manuscript reports of federal *habeas* cases reviewing legality of military enlistments during War of 1812); W. Nelson, "The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws," *in Law in Colonial Massachusetts, 1630-1800*, at 419, 457 (1984) (discussing review of same by state courts on common law *habeas* and noting continued use of common law writ "to provide relief against abuses of power by government officials").

[100] Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577.

[101] Bright. (N.P.) 269 (Pa. 1813).

[102] *Id.* at 283 (Tilghman, C.J.); *id.* at 301 (conclusion at end of report). Although the petitions were brought under state law, they demonstrate the court's general understanding of *habeas corpus* law. *See* G. Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens," 98 *Colum. L. Rev.* 961, 993 (1998).

enemy on *habeas*,[103] which the prisoner had not done, instead admitting that he was an alien enemy.[104] *Lockington* also contains a reference to a decision of Chief Justice Marshall on circuit, releasing an alleged enemy alien on *habeas* based on defects in the marshal's order.[105] In another case, a prisoner was discharged based on his showing that he was a citizen of the United States (though a native of Ireland), and thus not an enemy alien.[106]

Finally, consistent with English traditions, early American courts reviewed "enemy alien" classifications in non-*habeas* cases as well. Judicial determinations of an individual's alleged enemy alien status occurred, for example, in property and debt actions after the Revolutionary War,[107] and in similar disputes following the commencement of the War of 1812.[108]

In sum, the historical evidence is not consistent with the government's claim that the writ of *habeas corpus* guaranteed by the Constitution is unavailable to test even the classification as "alien enemies" of those detained at Guantánamo. Guantánamo

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[103] Bright. (N.P.) at 298-99 (Brackenridge, J.) ("I do not see that any *habeas corpus* can issue, *unless* the applicant can make an affidavit in the first instance, that he is not an alien enemy, or, in other words, a British subject, [while the war was raging] with that nation.") (second emphasis added).

[104] *Id.* at 298 ("admission by the applicant" that he is "an alien enemy").

[105] *Id.* at 296-97 (describing the case, as read from "a gazette"). The case is unreported, and has not been found in the files of the circuit court, though it is possible that a newspaper account still exists. Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens," *supra*, at 994.

[106] *Laverty v. Duplessis*, 3 Mart. (o.s.) 42, 1813 WL 757, at *1 (La. 1813).

[107] *See, e.g., Executors of Cruden v. Neale*, 2 N.C. (1 Hayw.) 338, 1796 WL 273, at *2-3 (N.C. Super. L. & Eq. 1796) (man who left North Carolina and joined British during Revolutionary War may nevertheless sue on debt); *Bayard v. Singleton*, 1 N.C. 5, 1787 WL 6, at *3-4 (N.C. Super. L. & Eq. 1787) (in ejectment action, determining "enemy alien" status of plaintiff's father).

[108] *See, e.g., Clarke v. Morey*, 10 Johns. 69 (N.Y. 1813) (Kent, C.J.) (in assumpsit action, relying on *Sparenburgh v. Bannatyne* and *Sylvester's Case*, *supra*, as well as international law, in analyzing and rejecting defendant's claim that plaintiff was "alien enemy" and thus barred from suit).

lies a mere 90 miles from the United States and has been subject to the exclusive control and jurisdiction of the United States for the past century. No other law but U.S. law operates there. The historical evidence suggests instead that the denial of all *habeas corpus* review in such a situation would contravene the fundamental principles that have governed the availability and operation of the Great Writ since well before the United States Constitution was adopted.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court exercise jurisdiction over the *habeas corpus* petitions.

Respectfully submitted,

JAMES OLDHAM
Counsel of Record
St. Thomas More Professor of
Law & Legal History
Georgetown University
Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9090

January 14, 2004

Of Counsel:

Michael J. Wishnie
Professor of Clinical Law
New York University
School of Law
245 Sullivan Street
New York, NY 10012
(212) 998-6471

Daniel J. Hulsebosch
Assistant Professor
Saint Louis University
School of Law
3700 Lindell Boulevard
St. Louis, MO 63108
(314) 977-3308

(28) (27)

Nos. 03-334, 03-343

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RASUL, SHAFIQ, et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

AL ODAH, FAWZI K., et al.,

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v.

UNITED STATES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF FORMER U.S. GOVERNMENT OFFICIALS IN SUPPORT OF PETITIONERS

GERALD L. NEUMAN
435 West 116th Street
New York, NY 10027

PHILLIP H. RUDOLPH
GARE A. SMITH
DANIEL FELDMAN
Foley Hoag LLP
1875 K Street, NW
Suite 800
Washington, DC 20006

HAROLD HONGJU KOH
Counsel of Record
MARY J. HAHN
Allard K. Lowenstein
International Human
Rights Clinic
127 Wall Street
New Haven, CT 06520
(203) 432-4932

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

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U.K. Identifies British Captive, Miami Herald, May 13, 2002 26

INTEREST OF *AMICI CURIAE*

Amici are former U.S. government officials who have exercised legal responsibility over matters concerning the U.S. Naval Base at Guantanamo, the Panama Canal, or other U.S. bases on foreign soil and those whose responsibilities substantially involved the scope of U.S. jurisdiction and activities abroad.[1] In so doing, they have acted under the conviction that the Constitution constrains the authority of U.S. government officials acting in these places. *Amici* include:

The *Honorable John H. Dalton* (1993-1998) and the *Honorable Richard Danzig* (1998-2001) each served as Secretary of the Navy. Danzig (1993-1997) and the *Honorable Jerry MacArthur Hultin* (1997-2000) served as Under Secretary of the Navy. The *Honorable Carolyn H. Becraft* was Assistant Secretary of the Navy (Manpower and Reserve Affairs) from 1998-2001.

The *Honorable Philip B. Heymann* (1993-1994) served as Deputy Attorney General of the United States with responsibility for overseeing law enforcement activities abroad.

The *Honorable Doris Meissner* was Commissioner of the INS from 1993-2000, Acting INS Commissioner in 1981, and Executive Associate Commissioner from 1982-1986. *T. Alexander Aleinikoff* served as General Counsel and then as Executive Associate Commissioner for Programs of the INS from 1994-1997.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief.

The *Honorable Patricia Wald* was Assistant Attorney General in the Office of Legislative Affairs from 1977-1979, a judge on the U.S. Court of Appeals for the District of Columbia Circuit from 1979-1999, and served as Chief Judge from 1986-1991.

SUMMARY OF ARGUMENT

Petitioners have been apprehended and transported halfway around the world to be held at Guantanamo Bay Naval Base, Cuba. The U.S. Government now claims that no court has jurisdiction to examine the lawfulness of any aspect of the regime under which petitioners may be detained, tried, or even executed.

As former government officials who have exercised legal responsibility over matters concerning Guantanamo and other areas outside U.S. borders, *amici* dispute this claim. Federal courts must have jurisdiction to review detention at Guantanamo because the United States exercises complete jurisdiction and control over that territory. In comparable areas where the United States has exercised sovereign powers without possessing titular sovereignty, the courts have held fundamental constitutional rights applicable to both citizens and foreign nationals under the rationale of the *Insular Cases*. The same reasoning mandates protection of fundamental constitutional rights of foreign nationals brought to Guantanamo.

Even putting aside the special character of Guantanamo, foreign nationals who have been subjected to prolonged custody under total U.S. control are entitled to fundamental due process rights. Providing due process protections at an offshore prison built by the United States in secure territory would not be "impracticable and anomalous" within the meaning of this Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990).

Finally, the court of appeals erred in extending the World War II-era precedent of *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), to allied nationals held at Guantanamo. Not only is *Eisentrager* clearly distinguishable, it rested on outdated assumptions about habeas corpus, and its policy rationale does not apply to the petitioners' detention.

ARGUMENT

I. ALIENS AT GUANTANAMO, A TERRITORY UNDER THE COMPLETE JURISDICTION AND CONTROL OF THE UNITED STATES, ARE PROTECTED BY FUNDAMENTAL CONSTITUTIONAL RIGHTS

Guantanamo Bay Naval Base has a total area of over forty-five square miles, thirty-one of them on land.[2] Its land area is roughly the size of St. Thomas, V.I.; it is larger than Manhattan, and nearly half the size of the District of Columbia.[3] "The base is entirely self-sufficient, with its own water plant, schools, transportation, and entertainment facilities."[4] The base population has recently grown to 6,000, and "[i]n addition to McDonald's, there are now Pizza Hut, Subway and KFC [outlets]. Another gym is being built, and town houses, and a four-year college opens

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[2] See Navy Office of Information, *Statistical Information, U.S. Naval Base, Guantanamo Bay, Cuba* (1985); Wayne S. Smith, *The Base from the U.S. Perspective*, in *Subject to Solution: Problems in Cuban-U.S. Relations* 97, 98 (Wayne S. Smith & Esteban Morales Dominguez eds., 1988).

[3] See *The New Columbia Encyclopedia* 772, 1681, 2900-01 (William H. Harris & Judith S. Levy eds., 1975) (32, 22, and ca. 70 square miles, respectively).

[4] Smith, *supra*, at 98-99.

next month." Nancy Gibbs, *Inside 'The Wire'*, Time, Dec. 8, 2003, at 40. The current base commander describes it as "small-town America." Carol Rosenberg, *New Chief Brings Guantanamo Up to Date,* Miami Herald, Oct. 25, 2003, *available at* 2003 WL 65453538. The detention facility where petitioners are being held is "hidden away in a restricted area, behind armed checkpoints, several ridgelines from downtown." Matthew Hay Brown, *Oldest U.S. Base Overseas Harbors Hometown Feel,* Orlando Sentinel, Dec. 22, 2003, *available at* 2003 WL 70493321.

The United States is not sovereign over Guantanamo, but occupies that territory under an unusual indefinite lease, which provides that "the United States shall exercise complete jurisdiction and control over and within said areas" during the period of the occupation.[5] The lease agreement was continued in effect by a subsequent treaty in 1934, "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations." Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. 3, T.S. No. 866.[6]

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[5] Article 3 of the Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States *shall exercise complete jurisdiction and control* over and within said areas. . . .

Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. 3, T.S. No. 418 (emphasis added).

[6] The United States has consistently taken the position that the agreement continues indefinitely, until terminated by the mutual consent of the parties, despite the termination of diplomatic relations

(Continued on following page)

The unusual extent of U.S. powers at the Guantanamo base reflects its origins during the period of American colonialism. See, *e.g.*, George Stambuk, *American Military Forces Abroad* 19-22 (1963); Helmut Rumpf, *Military Bases on Foreign Territory*, in 3 *Encyclopedia of Public International Law* 381, 382-83 (1997). Cuba's agreement to provide coaling or naval stations was required by the Platt Amendment, a congressional measure that stated conditions governing the withdrawal of the U.S. military administration that had governed Cuba since the Spanish-American War. See Act of Mar. 2, 1901, ch. 803, 31 Stat. 895, 897-98 (1901); see also *Customs Duties – Goods Brought Into United States Naval Station at Guantanamo Bay, Cuba*, 35 Op. Att'y Gen. 536 (1929); Smith, *supra*, at 97.

At Guantanamo, the United States is accountable only to itself. U.S. law is the only law recognized and the only law applied. Guantanamo is the only U.S. overseas base without a Status of Forces Agreement defining the allocation of civil and criminal jurisdiction over military and other personnel. Given the totality of U.S. territorial jurisdiction over the base and the lack of access to the rest of Cuba since 1959, no such agreement is needed. Nor does the United States require Cuba's consent to bring prisoners to the base.

The Justice Department's own Office of Legal Counsel analyzed the effect of this "unusual international agreement" in a formal opinion in 1982. *Installation of Slot Machs. on U.S. Naval Base, Guantanamo Bay*, 6 Op. Off.

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between the United States and Cuba in January 1961. See State Territory, Jurisdiction, and Jurisdictional Immunities: International Leases, 1979 Digest of United States Practice in International Law § 1, 794-95 (Marian Lloyd Nash ed., 1983); Robert L. Montague, III, *A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem*, 50 Ky. L.J. 459, 468-69 (1962).

Legal Counsel 236, 237 (1982). Because the lease placed the base under the exclusive jurisdiction of the United States, the opinion concluded that it therefore came within the federal Anti-Slot Machine Act. *Id.* at 242.

"The United States is entirely a creature of the Constitution. Its power and authority have no other source." *Reid* v. *Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion) (footnote omitted); see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). Thus, the question before this Court is not whether the Constitution is in force at Guantanamo, but which constitutional protections apply to the detainees.

In the nineteenth century, this Court applied the Bill of Rights fully to all federally-governed territories. See, *e.g.*, *Springville* v. *Thomas*, 166 U.S. 707 (1897). In 1901, however, in the *Insular Cases*, a majority of the Court held that only "fundamental" constitutional rights extended by their own force to "unincorporated" territories.[7] The *Insular Cases* concluded that constitutional provisions do not extend to particular territory by the will of Congress, but rather, as a result of the *relationship* that Congress creates between the United States and the territory.[8] The *Insular Cases* forged a compromise between the forces of constitutionalism and the forces of empire by guaranteeing that the most fundamental constitutional rights would be

[7] The *Insular Cases* doctrine expounded in Justice Edward White's concurring opinion in *Downes* v. *Bidwell*, 182 U.S. 244, 287, 289 (1901), received majority approval in *Dorr* v. *United States*, 195 U.S. 138 (1904). It distinguished earlier cases as involving territories "incorporated" into the United States, holding that not all constitutional limitations extended to "unincorporated" territories. *Id.* at 142.

[8] Since the decline of colonialism, the doctrine has been reinterpreted as enabling Congress to avoid an overly rigid "imposition of unfamiliar and possibly unwanted rules on territorial cultures." *Rayphand* v. *Sablan*, 95 F. Supp. 2d 1133, 1138 (D. N. Mar. I. 1999), *aff'd mem. sub nom. Torres* v. *Sablan*, 528 U.S. 1110 (2000).

honored wherever the United States possesses governing authority. In such cases, it is the exercise of complete jurisdiction and control, not nominal sovereignty, that requires the United States to recognize fundamental rights.

Although Guantanamo is unusual, it is not *sui generis*. History records at least three other examples of territory outside U.S. territorial borders and sovereignty, but still under the complete jurisdiction and control of the United States: the Canal Zone, the Trust Territory of the Pacific Islands, and the former American sector in Berlin. In each of these instances, U.S. courts have, by extrapolation from the *Insular Cases*, found fundamental constitutional rights to be applicable to citizens and aliens within these territories. As in Guantanamo, the United States for strategic reasons gained full powers of jurisdiction and control over these territories, without ever possessing actual sovereignty.

A. The Canal Zone

The Canal Zone shares much common history with Guantanamo. In both cases, early in this century the United States acquired rights for a particular purpose in a zone of territory in a newly independent state, while reserving underlying sovereignty over the territory to the foreign state. As the century progressed, tensions resulted in both territories. In the case of Panama, these developments ultimately led to the return of jurisdiction over the Canal Zone under the Panama Canal Treaty of 1977, Sept. 7, 1977, U.S.-Panama, T.I.A.S. No. 10030. See, *e.g.*, Hans Smit, *The Panama Canal: A National or International Waterway?*, 76 Colum. L. Rev. 965 (1976).

Article II of the Isthmian Canal Convention of 1903 granted "to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal. . . . " Isthmian Canal Convention, Nov. 18, 1903, U.S.-Panama, art. II, 33

Stat. 2235. Like the Guantanamo lease, Article III granted the United States

> all the rights, power and authority within the zone . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

Id. at art. III.

U.S. governance of the Canal Zone exhibited striking parallels to Guantanamo. The Canal Zone was "in effect one great government reservation." R.R. Baxter, *The Law of International Waterways* 86 (1964). The Canal Zone government was wholly non-elective.[9] Virtually all the land in the Canal Zone was owned by the U.S. government and occupied under revocable licenses issued by the Governor. Baxter, *supra*, at 85-86; C.Z. Code tit. 2 §§ 331-334 (1963). The presence of both U.S. citizens and foreign nationals within the Canal Zone was "at the suffer[a]nce of the U.S. Government," *Lucas* v. *Lucas*, 232 F. Supp. 466, 469 (D.C.Z. 1964), and citizens and aliens alike were subject to deportation from the Zone under broad criteria of public interest. See C.Z. Code tit. 2, § 841; Classes of Persons Subject to Exclusion or Deportation, 35 C.F.R. § 59.1 (1976); *cf. Canal Zone* v. *Gonzalez T. (Tunon)*, 607 F.2d 120 (5th Cir. 1979) (holding that deportation procedures complied with due process).

[9] Its Governor was appointed, by tradition, from the Army Corps of Engineers, and also served as president of the government-owned Panama Canal Company. C.Z. Code tit. 2, §§ 32, 64 (1963); Baxter, *supra*, at 85. The Governor exercised extensive quasi-legislative and executive powers, subject to a Canal Zone Code enacted by the U.S. Congress and the oversight of the Secretary of the Army and the President. C.Z. Code tit. 2, § 31.

As the era of colonialism receded, the courts came to protect rights in the Canal Zone just as they treated them in unincorporated territories of the United States.[10] Although some decisions have relied on a statutory bill of rights set out by Congress in the Canal Zone Code, others[11] have subjected U.S governmental actions, including federal statutes, directly to constitutional scrutiny.

Because the doctrine of the *Insular Cases* concerned the status of territories, not of persons, fundamental constitutional rights were equally applicable to United States citizens and aliens in the Canal Zone and other unincorporated territories. See, *e.g.*, *Examining Bd. of Eng'rs, Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572 (1976) (Puerto Rico). The Fifth Circuit recognized this equality of rights in *Canal Zone* v. *Scott*, 502 F.2d 566, 568 (5th Cir. 1974) ("[N]on-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive.").[12] The Fifth Circuit has also subjected congressional

[10] See, *e.g.*, *United States* v. *Husband R. (Roach)*, 453 F.2d 1054, 1057 (5th Cir. 1971) (characterizing Canal Zone as "unincorporated territory" for constitutional purposes), *cert. denied*, 406 U.S. 935 (1972); see also *Canal Zone* v. *Scott*, 502 F.2d 566, 570 (5th Cir. 1974).

[11] See, *e.g.*, *Jimenez* v. *Tuna Vessel "Granada"*, 652 F.2d 415 (5th Cir. 1981) (finding district court denied defendant due process); *In re Gayle*, 136 F.2d 973 (5th Cir.) (construing Canal Zone Code against its literal meaning to avoid a due process violation), *cert. dismissed*, 320 U.S. 806 (1943); *Walker* v. *Chief Quarantine Officer*, 69 F. Supp. 980 (D.C.Z. 1943) (applying Thirteenth Amendment and due process clause to a civilian employee of Army); *Canal Zone* v. *Castillo L. (Lopez)*, 568 F.2d 405 (5th Cir.) (upholding vagrancy provision of the Code against a due process vagueness challenge), *cert. denied*, 436 U.S. 910 (1978).

[12] See also *Husband R. (Roach)*, 453 F.2d at 1058 ("In areas under the jurisdiction of the United States to which the Fifth Amendment is applicable, an alien is entitled to its protection to the same extent as a citizen.").

legislation that allegedly discriminated against noncitizens in the Canal Zone to constitutional review. See *Raven* v. *Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978) (upholding denial of Privacy Act rights to a Panamanian employee against an equal protection attack), *cert. denied*, 440 U.S. 980 (1979).

The status of Guantanamo has been characterized as "in substance identical with that in the [Panama] Canal Zone." Sedgwick W. Green, *Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 Harv. L. Rev. 781, 792 (1955); see also *Customs Duties – Goods Brought Into United States Naval Station at Guantanamo Bay, Cuba*, 35 Op. Att'y Gen. 536 (1929) (relying on this comparison); Law of the Sea and International Waterways: Canals, 1977 Digest of United States Practice in International Law § 7, 593-94 (John A. Boyd ed., 1979) (analogizing Canal Zone and Guantanamo); Stambuk, *supra,* at 20 (analyzing Guantanamo and Canal Zone rights in parallel); Rumpf, *supra,* at 382-83 (same). Given that aliens enjoyed fundamental constitutional rights in the Canal Zone, there can be no basis for denying those same rights to aliens who are being held on Guantanamo.

B. The Trust Territory of the Pacific Islands

U.S. courts have similarly held that the federal government must respect the fundamental constitutional rights of noncitizens in the Trust Territory of the Pacific Islands ("TTPI"). After liberating Micronesia from Japan in the Second World War, the United States sought to retain strategic control by establishing a "strategic trust territory" under the supervision of the United Nations Security Council.[13] Article 3 of the Trusteeship Agreement

[13] See Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 487-513 (1989); Stanley K. McLaughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions* 461-78 (1995).

gave the United States "full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement." Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, U.S.-U.N., art. 3, T.I.A.S. 1665.

From 1952 on, the TTPI was administered by the Department of the Interior, which exercised both executive and legislative powers and appointed TTPI judges. Local legislative bodies had powers subordinate to the Secretary of the Interior. Ultimately, the Northern Mariana Islands joined the United States as a Commonwealth; three other regions chose independence but remained states in free association with the United States after the U.S. Trusteeship over them terminated in 1986 (1994 for Palau).

During the Trusteeship, the United States exercised complete jurisdiction and control over the TTPI without being sovereign there. *Callas* v. *United States*, 253 F.2d 838, 839-40 (2d Cir.) (holding TTPI a "foreign country" for Federal Tort Claims Act purposes), *cert. denied*, 357 U.S. 936 (1958). Persons born in the Trust Territory were aliens in relation to the United States. *Id.* at 842 (Hincks, J., concurring).

Nevertheless, federal courts regularly held that the Constitution directly extended rights to TTPI inhabitants and other aliens in the Trust Territory and bound the federal government.[14] In *Ralpho* v. *Bell*, 569 F.2d 607, 618-19 (D.C. Cir.), *reh'g denied*, 569 F.2d 636 (D.C. Cir. 1977), the court of appeals held that the Due Process Clause constrained the Micronesian Claims Commission, a congressionally created federal agency based in Saipan, in its adjudication of inhabitants' claims. The court concluded that because the inhabitants of the Trust Territory were as

[14] From 1952 onward, the Trust Territory Code included a Bill of Rights promulgated by the Secretary of the Interior, which bound the Trust Territory government but did not bind Congress or the Secretary. The cases cited here address the direct application of constitutional rights.

fully subject to American governing power as those of an unincorporated territory, fundamental constitutional rights vis-à-vis the federal government extended to noncitizens in the territory. Similarly, in *Juda* v. *United States*, 6 Cl. Ct. 441 (1984), the United States Claims Court held that the Takings Clause protected noncitizens as well as United States citizens in the Marshall Islands. Accord *Nitol* v. *United States*, 7 Cl. Ct. 405 (1985); see also *Porter* v. *United States*, 496 F.2d 583 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975) (finding taking not attributable to United States).

Even after local constitutional governments had been established in the four regions, the U.S. District Court for the Northern Mariana Islands held that the remaining operations of the federal High Commissioner were required to respect the fundamental rights of the inhabitants under the *Insular Cases*. See *Temengil* v. *Trust Territory of Pacific Islands*, 33 Fair Empl. Prac. Cas. (BNA) 1027, 1058-60, 1983 U.S. Dist. Lexis 18384, *112-*121 (D. N. Mar. I. 1983) (finding Fifth Amendment equal protection and due process requirements directly applicable to salary discrimination in TTPI government employment), *aff'd in part, rev'd in part on other grounds*, 881 F.2d 647 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990).

C. The American Sector in Berlin

After the Second World War, the four Allied Powers undertook the military occupation of Germany. Even after the occupation of the rest of Germany had ended, occupation of Berlin continued until 1990 under the umbrella of the Allied Kommandatura, with each of the Four Powers governing its own sector. See *United States* v. *Tiede*, 86 F.R.D. 227, 229-35 (U.S. Ct. for Berlin 1979); Peter E. Quint, *The Constitutional Law of German Unification*, 50 Md. L. Rev. 475, 597-99, 611-20 (1991). Day-to-day governing responsibility in West Berlin was exercised by an indigenous government, but subject to the supreme authority of the Four Powers.

The constitutional status of the American sector in Berlin was analyzed in Judge Stern's opinion in *Tiede*, concerning the criminal trial of two East Germans by the American authorities in Berlin for airplane hijacking. Judge Stern held, first, that the Constitution was by definition operative in an American court, and that due process prohibited the U.S. government prosecutors from dictating to the judge the resolution of a constitutional issue. *Tiede*, 86 F.R.D. at 242-44.[15] He concluded that, whether under *Reid* v. *Covert* or under the *Insular Cases*, an alien defendant being prosecuted by the federal government in the American Sector in Berlin was entitled to such fundamental rights as due process and trial by jury. *Id.* at 249-53.

D. Guantanamo

Like the Canal Zone, the Trust Territories, and the American Sector in Berlin, Guantanamo is also a territory where, though the United States is not sovereign, fundamental constitutional rights apply to citizens and aliens alike under the rationale of the *Insular Cases*. See *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992) (concluding that the Constitution protects "aliens brought to and detained by [U.S.] personnel on a land mass exclusively controlled by the United States"), *vacated as moot sub nom. Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993).[16]

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[15] He held that by 1979, the status of the American sector for constitutional purposes could no longer be measured by precedents involving military occupation and enemy aliens. *Tiede*, 86 F.R.D. at 245-46.

[16] This Court vacated the *Haitian Centers Council* decision after the preliminary injunction that that decision affirmed was superseded by a permanent injunction. *Amici* cite the case not as precedent, but because its reasoning is correct.

The court of appeals erroneously denied the justiciability of constitutional rights at Guantanamo by misconstruing this Court's decision in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948). See *Al Odah* v. *United States*, 321 F.3d 1134, 1143 (D.C. Cir. 2003). In fact, *Vermilya-Brown* emphasized that whether a legal norm applied at a given location was a justiciable issue, and that it depended upon the objective conditions created by prior government action. 335 U.S. at 380. The Court observed that the extent of Congress's powers to regulate overseas bases under the "Territory or other Property" clause of Article IV did *not* depend upon obtaining "sovereignty in the political or any sense." *Id.* at 381. Because overseas possessions occupied a continuum of relationships to the United States, for purposes of wage regulation the majority perceived no dividing line separating a modern base leased from the United Kingdom in Bermuda from the earlier acquisitions of Guantanamo and the Canal Zone or island territories like Puerto Rico and Guam. *Id.* at 386-90; see also *United States* v. *Spelar*, 338 U.S. 217, 223-24 (1949) (Frankfurter, J., concurring) (legal significance of terms like "foreign country" or "possession" depends upon context).

Nor does the fact that Guantanamo is occupied as a military naval base somehow prevent the application of fundamental constitutional rights.[17] The United States possesses several "unorganized" insular territories, some of which – like Wake Atoll – are operated as military installations, but in all of them fundamental constitutional rights apply. See General Accounting Office, *U.S. Insular*

[17] Justice Edward White, in first expounding his theory that only fundamental constitutional limitations extend to territory not "incorporated" in the United States, explicitly had in mind "a naval station or a coaling station on an island" and an "inhabited strip of land" adjoining "an interoceanic canal," as well as entire islands. See *Downes* v. *Bidwell*, 182 U.S. 244, 311 (1901) (opinion of White, J.).

Areas: Application of the U.S. Constitution, GAO/OGC-98-5, at 7-10, 39-63 (1997). The other non-sovereign territories in which U.S. courts have applied constitutional rights have also had military features. The Canal Zone was a quasi-military reservation administered under Army supervision, subject to access restrictions even for U.S. citizens. The Pacific Islands were the sole example of a "strategic trust territory" created under Article 82 of the United Nations Charter. The Allies protected West Berlin as a "beleaguered island of freedom" in the midst of Communist East Germany. *Tiede*, 86 F.R.D. at 246.

To accept the lower court's denial of all constitutional rights to aliens on Guantanamo would affect more people than simply the petitioners in this case. First, operation of the base has traditionally depended upon foreign labor, and the United States has employed hundreds of foreign nationals at Guantanamo – including Cubans and Jamaicans, and more recently Filipinos – whom the lower court's ruling would leave without legal recourse. See Associated Press, *In Cuba, U.S. Relies on Low-Paid Help of Non-Americans,* Commercial Appeal (Memphis, TN), Feb. 1, 2002, at A7, *available at* 2002 WL 3461214 (noting presence of 1,000 foreign workers).[18]

Second, in the 1990s the Government repeatedly used Guantanamo as a holding center for thousands of refugees from Haiti and Cuba.[19] In litigation over the rights of detained refugees, the Second and Eleventh Circuits pointedly disagreed about the applicability of the Bill of Rights to aliens at Guantanamo. Compare *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326 (2d Cir. 1992)

[18] See Navy Office of Information, *Statistical Information, U.S. Naval Base, Guantanamo Bay, Cuba* (1985) (reporting 1,059 non-citizen employees).

[19] See Maria E. Sartori, *The Cuban Migration Dilemma: An Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens*, 15 Geo. Immig. L.J. 319 (2001).

(findir g plaintiffs likely to succeed on their constitutional claims), *vacated as moot sub nom. Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993), with *Cuban-American Bar Ass'n* v. *Christopher*, 43 F.3d 1412 (11th Cir. 1995) (denying that rights exist).[20] Although the Second Circuit decision was eventually vacated as moot, *amici* submit that it was the better-reasoned opinion. Meanwhile, the New York district court held after trial that the operation of a long-term detention camp concentrating HIV-positive refugees at Guantanamo without adequate medical facilities violated both the procedural and substantive due process rights of the detainees. *Haitian Ctrs. Council, Inc.* v. *Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (vacated by Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994)). The government has since used Guantanamo as an interim detention and interrogation center for interdicted Chinese migrants and smugglers. See, *e.g.*, *United States* v. *Li*, 206 F.3d 56, 69 n.1 (1st Cir.) (Torruella, C.J., dissenting), *cert. denied*, 531 U.S. 956 (2000). Again, the lower court's ruling would deny legal recourse to all such individuals.

Third, the Government is now building a permanent prison on the base. See Neil A. Lewis, *U.S. Erecting a Solid Prison At Guantanamo for Long Term,* N.Y. Times, Oct. 22, 2003, at A20. Were this Court to hold that foreign nationals have no rights on Guantanamo, the Government could use that prison not just for suspected terrorists, but also for extraterritorial arrest and punishment of any alleged criminals, all outside the constitutional safeguards of the criminal justice system.

Although the United States has claimed in recent years that aliens at Guantanamo are outside the Constitution, in

[20] In *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), this Court upheld the Government's authority to return refugees directly from high seas interdiction, but did not discuss rights on Guantanamo.

practice, our government has consistently afforded them such protections. The United States exercises eminent domain power at Guantanamo, and the Court of Claims has assumed that the Takings Clause of the Fifth Amendment applied to a Cuban contractor there. *Huerta* v. *United States*, 548 F.2d 343 (Ct. Cl.), *cert. denied*, 434 U.S. 828 (1977) (finding that the claim failed on the merits). But see *id.* at 348 (Davis, J., dissenting in part) (finding a taking).[21] The United States exercises criminal jurisdiction over both citizens and aliens at Guantanamo, to the exclusion of Cuban law, and has traditionally brought civilian criminal defendants to the United States for prosecution, with full constitutional protections. See, *e.g.*, *United States* v. *Lee*, 906 F.2d 117 (4th Cir. 1990) (Jamaican national); *United States* v. *Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. citizen).

If aliens at Guantanamo had no constitutional rights, the Government would be free to revise this practice at will. Under the Government's current reasoning, the United States could have indefinitely detained, prosecuted, and convicted foreign nationals on Guantanamo, or even executed them there without ever affording them any constitutional rights, including habeas corpus.

II. EVEN PUTTING ASIDE THE SPECIAL CHARACTER OF GUANTANAMO, FOREIGN NATIONALS HELD IN PROLONGED UNITED STATES CUSTODY OUTSIDE THE UNITED STATES ARE PROTECTED BY THE DUE PROCESS CLAUSE

Other factors besides the special character of Guantanamo demonstrated in Part I entitle the petitioners to

[21] See also *Skip Kirchdorfer, Inc.* v. *United States*, 6 F.3d 1573 (Fed Cir. 1993) (upholding taking claim of U.S. company for property at Guantanamo).

due process protections. The petitioners allege that U.S. officials have wrongfully imprisoned them, for months running into years. Some claim to have been captured by bounty hunters and sold fraudulently to the United States, without receiving any opportunity to demonstrate their innocence. The court of appeals rejected their complaints, reasoning that nonresident aliens outside the sovereign territory of the United States lack constitutional rights of any kind. *Al Odah*, 321 F.3d at 1141. The lower court derived that theory from its misinterpretation of this Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), which held only that nonresident aliens without substantial connections to the United States are not protected by the Fourth Amendment against searches of their property in a foreign country. That holding does not entail the complete denial of all constitutional protection to foreign nationals subject to indefinite detention and pervasive control by the United States.[22] This Court should reject such a lawless interpretation.

If the Government denies that foreign nationals have rights, then by confining them at Guantanamo, it is engaged not in legal detention, but in a lawless exercise of naked force. The Constitution, taken as a whole, binds the conduct of the federal government wherever it acts. "[T]he Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Verdugo-Urquidez*, 494 U.S. at 277 (1990) (Kennedy, J., concurring). The question here is whether and how particular constitutional protections – especially the Due

[22] The D.C. Circuit has systematically overread that decision, even finding that there are no constitutional limits upon U.S. officials who torture foreign nationals abroad. See *Harbury* v. *Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds*, 536 U.S. 403 (2002).

Process Clause of the Fifth Amendment – apply to the petitioners in this case.[23]

Petitioners are "persons" in prolonged U.S. custody, deprived of liberty outside any active war zone or territory under belligerent occupation. As detainees, they are subject to comprehensive and unceasing control by U.S. officials claiming to act under U.S. law, and may well remain so for months or years. They therefore must be entitled to fundamental due process protection.[24]

The claim that aliens in federal custody outside the United States lack any constitutional rights mocks the purposes of rights provisions in our constitutional system. The Constitution *recognizes* rights; it does not merely *create* them. The Framers regarded fundamental constitutional rights like physical liberty and freedom of conscience as natural and inalienable rights of mankind.[25] Moreover, the system of legally enforceable constitutional rights legitimates the government's assertion of sovereignty over individuals by imposing compensating limitations on exercises of governmental power. See Henkin, *supra*, at 408-09. James Madison emphasized this function in his celebrated Report condemning the Alien and Sedition Acts: "Aliens are no more parties to the laws than

[23] As Justice Harlan phrased it, "The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place." *Reid* v. *Covert*, 354 U.S. at 74 (Harlan, J., concurring in the result) (emphasis omitted).

[24] Because this case only addresses the rights of long-term detainees in non-hostile territory, the Court need not decide the full range of the circumstances in which due process may limit U.S. government action abroad.

[25] See, *e.g.*, *Faretta* v. *California*, 422 U.S. 806, 830 (1975); Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 290-93 (1997); Louis Henkin, *Rights: American and Human*, 79 Colum. L. Rev. 406, 408-09 (1979).

they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage."[25]

Before the Second World War, this Court assumed that constitutional rights were unavailable – to both citizens and aliens – outside the borders of the United States. This obsolete assumption reflected the rigidly territorial methodology of turn-of-the-century conflict of laws. Compare, *e.g.*, *In re Ross*, 140 U.S. 453, 464 (1891) (Field, J.) ("The Constitution can have no operation in another country."), with *Pennoyer* v. *Neff*, 95 U.S. 714, 722 (1878) (Field, J.). But reliance on that assumption became untenable after the Second World War, as new global circumstances prompted, and new technology facilitated, broader extraterritorial activity. The post-war order condemned colonial acquisition; the United States adopted new forms of nonterritorial overseas presence; and extraterritorial enforcement of U.S. law mushroomed.

By the middle of the Cold War, this Court had decisively repudiated its geographically restricted approach to the Bill of Rights in *Reid* v. *Covert*, 354 U.S. 1 (1957), and *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960). Those cases held that the government must provide the safeguards of Article III and the Fifth and Sixth Amendments before inflicting punishment on civilian citizens accompanying United States armed forces abroad. The six Justices in the majority in *Reid* v. *Covert* offered two different approaches to determining which rights apply overseas. Justice Black wrote for four Justices favoring literal application of the Bill of Rights, while

[25] *Madison's Report on the Virginia Resolutions* (1800), *reprinted in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 556 (J. Elliot ed., 2d ed. 1836). For background on Madison's Report, see Gerald L. Neuman, *Strangers to the Constitution* 52-60 (1996).

Justices Frankfurter and Harlan applied a "'fundamental right' test [which is] . . . simila[r] to analysis in terms of 'due process.'" 354 U.S. at 53 (Frankfurter, J., concurring in the result); *id.* at 75 (Harlan, J., concurring in the result). A majority of the Court adopted Justice Black's approach in *Singleton*, 361 U.S. at 246-49.

Although *Reid* v. *Covert* involved only citizens, it destroyed the earlier assumption that constitutional rights were somehow territorially restricted. Lower courts subsequently extended constitutional analysis to extraterritorial law enforcement against noncitizens. See, *e.g.*, *United States* v. *Cortes*, 588 F.2d 106, 110 (5th Cir. 1975); *United States* v. *Toscanino*, 500 F.2d 267, *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974).

This Court finally began to explore the role of the Bill of Rights in extraterritorial criminal investigations in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990). Five Justices concluded that the Fourth Amendment has no application to the search of property belonging to a nonresident alien in a foreign country. The opinion of the Chief Justice placed particular emphasis on text of the Fourth Amendment's reference to a right "of the people." 494 U.S. at 265. The Chief Justice also emphasized the alien's lack of sufficient "connections" to the United States. 494 U.S. at 265, 271, 273, 274-75. Finally, the opinion drew on examples from different periods of constitutional history, suggesting that constitutional provisions may not apply to aliens (or citizens, for that matter) on the high seas or in foreign territory. 494 U.S. at 266-68.

But Justice Kennedy, the indispensable fifth member of the *Verdugo-Urquidez* majority, gave different, narrower reasons for limiting the scope of the Fourth Amendment. Applying the approach of Justice Harlan's concurrence in *Reid* v. *Covert*, he argued that the extraterritorial extension of the Bill of Rights should be determined by a contextual due process analysis to decide whether adherence to a specific constitutional guarantee would be "impracticable and anomalous." 494 U.S. at 277-78 (Kennedy, J.,

concurring). Applying that test, Justice Kennedy found imposition of Fourth Amendment warrant procedures on searches by U.S. agents in foreign countries impracticable, noting that different conceptions of privacy may prevail in other cultures. *Id.* at 278.[27]

Given these divergent analyses, *Verdugo-Urquidez* holds only – as the Chief Justice's opinion twice emphasizes – that the Fourth Amendment does not govern searches of nonresident aliens' property abroad. 494 U.S. at 261, 274-75. As the narrowest ground supported by a majority of the Court, Justice Kennedy's concurrence suggests that the government can rebut the textual breadth of a constitutional provision only by demonstrating that adherence to it would be "impracticable and anomalous." 494 U.S. at 278.[28]

It would be neither impracticable nor anomalous for the United States government to guarantee these alien petitioners due process. The Due Process Clause is phrased in universal terms, protecting any "person" rather than "citizens" or members of "the people." Nor does its wording suggest limitations as to place.

Standing alone, *Verdugo-Urquidez* does not clarify what circumstances other than citizenship, residence, and territorial presence should trigger the applicability of the Due Process Clause. But nonresident aliens are unquestionably "persons" capable of having due process rights. This Court has long held that aliens outside the United

[27] Justice Stevens agreed that the Fourth Amendment's warrant requirement should not apply abroad, given that a U.S. warrant would not be effective to authorize a search, and would have found the search reasonable. 494 U.S. at 279 (Stevens, J., concurring in the judgment).

[28] Unlike the court below, other courts of appeals have correctly recognized the limited nature of the *Verdugo-Urquidez* holding. See, *e.g.*, *United States* v. *Inigo*, 925 F.2d 641, 656 (3d Cir. 1991); *Lamont* v. *Woods*, 948 F.2d 825, 834 (2d Cir. 1991).

States are entitled to due process when they are sued as civil defendants in United States courts. See *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102 (1987). The Court has emphasized that this right "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Ins. Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

These cases also contradict any suggestion in *Verdugo-Urquidez* that aliens require "significant voluntary connection with the United States" to gain constitutional rights. *Verdugo-Urquidez*, 494 U.S. at 271. Under the minimum contacts doctrine of personal jurisdiction, it is precisely the *absence* of significant voluntary connection that forms the basis of the due process violation.

Nor has this Court ever suggested that U.S. courts can deny nonresident alien *plaintiffs* fair trials because of their location outside the territorial United States. U.S. courts undeniably stand open to suits by nonresident alien plaintiffs when jurisdiction over the defendant is proper.[29] Nor can prior "voluntary connection" to the United States be justified as a necessary prerequisite for fundamental due process protections. Maintaining involuntary captives of the United States as rightless outlaws because of their captive status would revive the logic of slavery, a constitutional practice that this country has long abandoned.

In any event, the Constitution undeniably protects involuntary subjects, such as children who may be too young to form voluntary connections. See *Plyler* v. *Doe*, 457 U.S. 202 (1982); *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976) ("Even one whose presence is this country is unlawful,

[29] See, *e.g.*, *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Taylor* v. *Carpenter*, 23 F. Cas. 742, 744 (C.C.D. Mass. 1844) (No. 13,784) (Story, Cir. J.) ("[T]hey are entitled, being alien friends, to the same protection of their rights as citizens.").

involuntary, or transitory is entitled to [due process] protection."). The very doctrine of the *Insular Cases* was designed to protect the fundamental rights of populations who had become involuntarily subjected to U.S. governance. Indeed, as Justice Kennedy noted, Verdugo-Urquidez himself, despite his involuntary presence, would enjoy all constitutional guarantees at trial. *Verdugo-Urquidez*, 494 U.S. at 278.

Finally, application of the Due Process Clause to foreign nationals held in custody by the United States at Guantanamo – or at other military bases in allied countries – would be in no sense "impracticable and anomalous." The petitioners are foreign nationals captured or arrested in distant foreign countries and deliberately transported by the government to the very threshold of the United States, in order to be detained, interrogated, and perhaps even tried and executed in an offshore prison camp. The base is highly secure, access is tightly restricted, and the detainees are totally under the government's control.

If the Due Process Clause does not apply to detainees at Guantanamo, the Government would have effective discretion to starve them, to beat them, and to kill them, with or without hearings and with or without evidence of any wrongdoing.[30] It could convict them on rumor and imprison them indefinitely, out of abundance of caution, to deter others, to reassure the public, or to conceal prior errors. In granting procedures, the Government could discriminate among detainees based on the color of their skin. If no constitutional rights applied to offshore detainees, then the government would be free to create a parallel

[30] While some of these actions would undoubtedly also violate international obligations of the United States, the Government denies the applicability of those norms, on grounds of location or status, and there are few effective mechanisms for enforcing them.

system of extraterritorial courts and extraterritorial prisons to punish extraterritorial crimes without legal oversight or constraint.

Surely this cannot be the law. Yet remarkably, the Government claims the *right* to such discretion as an inherent executive prerogative necessary to conduct a war against terrorism. But even if the Government could identify some concrete disadvantage from providing a particular due process protection, this would not automatically render applicability of the Due Process Clause to detention at Guantanamo "impracticable [or] anomalous." Due process is itself a flexible, contextual concept, which considers such disadvantages in balancing the needs of the government against the needs of the individual. *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976).

In sum, application of the due process clause to prolonged custody at an offshore facility under complete U.S. government control is neither "impracticable [nor] anomalous." What would be anomalous is authorizing the United States Government to create and run an offshore prison camp in a "rights-free zone" for the express purpose of evading constitutional restrictions.

III. THIS COURT'S DECISION IN *JOHNSON* v. *EISENTRAGER* DOES NOT PRECLUDE THE AVAILABILITY OF HABEAS CORPUS JURISDICTION FOR DETAINEES AT GUANTANAMO

Although the lower court relied heavily upon this Court's decision in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), that decision is clearly distinguishable and does not support the argument that courts lack jurisdiction over the petitioners' claims. Not only did *Eisentrager* rest

on since-overruled assumptions about habeas corpus, but its policy concerns are not implicated in this case.[31]

The Government maintains that simply being "captured abroad in connection with ongoing hostilities" places prisoners beyond the territorial reach of habeas corpus. But that sweeping generalization would extend *Eisentrager* far beyond its context. In *Eisentrager*, petitioners were indisputably nonresident enemy aliens[32] held in occupied territory during wartime, who had been tried and convicted by military commissions in recently liberated allied territory (then engulfed in civil war) and transferred to their homeland to serve their sentences. Here, by contrast, petitioners include nationals of allied countries who have not been charged, tried or convicted, and who fervently deny participation in any hostile action against the United States. Some allege that they were arrested in Pakistan, not Afghanistan; other Guantanamo detainees have reportedly been arrested in unrelated countries such as Bosnia, Gambia, and Zambia.[33]

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[31] The "minimum contacts" cases cited above illustrate the inaccuracy – even in its own day – of a dictum in *Eisentrager*, 339 U.S. at 770-71. While implying that an alien's presence within the territorial jurisdiction of the United States was somehow necessary for constitutional protection, Justice Jackson overlooked both the due process limitations on personal jurisdiction, and caselaw recognizing absent aliens as persons whose "private property" in the United States cannot be taken without just compensation. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931); see also *Sardino* v. *Fed. Reserve Bank of New York*, 361 F.2d 106, 111 (2d Cir. 1966) (Friendly, J.).

[32] The status of enemy alien in time of actual war constituted a well-established category of both U.S. and international law. The clarity of the status made it a useful device for regulating potentially hostile civilians without endangering neutral or allied nationals. Justice Jackson acknowledged its factual overbreadth, but relied on its lengthy legal pedigree in the United States and on the legal imputation of enemy allegiance to enemy nationals.

[33] See, *e.g.*, *U.K. Identifies British Captive,* Miami Herald, May 13, 2002, *available at* 2002 WL 19672415 (arrest in Zambia); Vikram Dodd,

(Continued on following page)

Significantly, *Eisentrager* conceded that enemy aliens convicted of war crimes in an unincorporated territory (namely, the Philippines, a few months before its independence), had access to habeas corpus. 339 U.S. at 779-80. Justice Jackson also noted that individuals detained in the United States under the Alien Enemies Act were entitled to review of the jurisdictional fact of enemy alien status on habeas corpus, even if not to review of their actual dangerousness.[34]

Eisentrager's territorial analysis also reflected the since-overruled opinion in *Ahrens* v. *Clark*, 335 U.S. 188 (1949), which treated the location of the petitioner – not the location of a relevant custodian – as the key to habeas corpus jurisdiction under federal statutes. In *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), this Court later rejected that interpretation of 28 U.S.C. § 2241, noting that it had already extended habeas corpus to citizens confined overseas outside any judicial district. 410 U.S. at 498. See also *Schlanger* v. *Seamans*, 401 U.S. 487 (1971) (emphasizing location of custodian); *Demjanjuk v. Meese*, 784 F.2d 1114 (D.C. Cir. 1986) (Bork, J.).[35]

The UK Businessmen Trapped in Guantanamo, The Guardian (U.K.), July 11, 2003, *available at* 2003 WL 56695608 (arrests in Gambia). Transfer from Bosnia to Guantanamo was documented in a critical decision of the transnational tribunal created by the Dayton Peace Accords. See *Boudellaa* v. *Bosnia and Herzegovina*, Nos. CH/02/8679, Oct. 11, 2002 (Human Rights Chamber for Bosnia and Herzegovina), *available at* http://www.hrc.ba (Algerian and Bosnian nationals).

[34] The Alien Enemies Act, 50 U.S.C. §§ 21-23, which applies during a "declared war," has not been employed since the Second World War, and the discretion that the statute delegated was later narrowed by U.S. adherence to the Fourth Geneva Convention. See Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 38, 42, 6 U.S.T. 3516, 75 U.N.T.S 287.

[35] *Eisentrager* also invokes an anachronistic view of habeas corpus as an exclusively Anglo-American institution. *Eisentrager*, 339 U.S. at

(Continued on following page)

More fundamentally, *Eisentrager* dates to a bygone era when a majority of the Court still adhered to the territorially restricted concept of the Constitution that it later abandoned in *Reid* v. *Covert*. Dissenting Justices had argued for an interpretation more consistent with the reality of the post-war global presence of the United States, but they did not persuade the majority until 1957.

Furthermore, the logistical and security concerns that informed the *Eisentrager* holding have no bearing here. The *Eisentrager* majority stressed the difficulty of transporting prisoners and witnesses from abroad. *Eisentrager*, 339 U.S. at 778-79. But that policy concern has been overtaken by modern telecommunications technology, which now enables courts to facilitate effective participation in judicial proceedings and provide due process by means of video teleconferencing.[36]

These factors counsel strongly against now extending *Eisentrager* to a factually distinct situation. *Eisentrager* expressed fear that the availability of habeas corpus for

779. Today, the right to a speedy judicial remedy for unlawful detention is a universally recognized human right. See [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(4), 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 9(4), 999 U.N.T.S. 171; American Convention on Human Rights, Nov. 22, 1969, art. 7(6), 1144 U.N.T.S. 123.

[36] See, *e.g.*, Fed. R. Civ. P. 43(a); 42 U.S.C. § 1997e(f) (authorizing use of telecommunications technology in litigation concerning prison conditions); 18 U.S.C. § 3265(a)(1)(B) (authorizing initial proceedings by telecommunications in prosecution of extraterritorial crimes by civilians accompanying armed forces). Because habeas corpus proceedings are civil in nature, see *Hilton* v. *Braunskill*, 481 U.S. 770 (1987); *Harris* v. *Nelson*, 394 U.S. 286 (1969), they are not subject to the concerns that this Court has expressed regarding a criminal defendant's Sixth Amendment right to physical confrontation of witnesses. *Cf. Maryland* v. *Craig*, 497 U.S. 836 (1990); *Amendments to the Federal Rules of Criminal Procedure*, 207 F.R.D. 89, 93 (2002) (statement of Scalia, J.).

"actual enemies" in active war zones or occupied territory would assist the enemy and hamper U.S. field commanders. 339 U.S. at 778-79. But even within the United States or its territories, Congress has undeniable power to suspend habeas corpus when invasion or ongoing conflict makes its use too dangerous.

During belligerent occupation, one might well worry about distant civilian courts compromising the efforts of outnumbered U.S. forces to govern a hostile population using the limited authority permitted by international law. But such policy concerns are wholly absent when the U.S. detains foreign nationals not in war zones or occupied lands, but in peaceful allied territory. *A fortiori* these concerns cannot justify denying the writ to persons brought deliberately by the U.S. government to territory where the U.S. is the only authority, precisely because they can be held there in total security.

The fact that some detainees have been *removed from* a war zone or zone of occupation cannot weigh against the availability of habeas corpus in their new, secure location. Even after World War II, when this Court understood the geographical scope of the writ more narrowly, it nonetheless permitted access to habeas for prisoners who had been transferred from occupied Germany to the United States, see *Wade* v. *Hunter*, 336 U.S. 684 (1949); *Madsen* v. *Kinsella*, 343 U.S. 341 (1952), and for a war criminal captured in the liberation of the Philippines, *In re Yamashita*, 327 U.S. 1 (1946). Even the ancient, outdated case of *In re Ross*, 140 U.S. 453 (1891), permitted a British national brought to the United States to serve his sentence to test by habeas the jurisdiction of a consular court in Japan.

Finally, *Eisentrager* states no absolute rule against access to habeas corpus, even for enemy nationals in occupied territory. Justice Jackson emphasized that "the doors of our courts have not been summarily closed upon these prisoners," and gave them the opportunity "to show some reason in the petition why they should not be subject to the usual disabilities of nonresident enemy aliens."

Eisentrager, 339 U.S. at 780-81. Unlike *Eisentrager*, the prisoners here are being held in unprecedented circumstances under a regime of recent invention whose legality has never been examined by any court. The U.S. government should not be permitted to evade judicial scrutiny by transporting them to Guantanamo instead of Puerto Rico.

CONCLUSION

The United States Constitution recognizes no rights-free persons or rights-free zones. Persons who have been deprived of their liberty must be granted an opportunity to challenge their subjection to a novel regime of detention before a civilian court.

For the foregoing reasons, this Court should reverse and remand the judgment of the Court of Appeals.

Respectfully submitted,

GERALD L. NEUMAN
435 West 116th Street
New York, NY 10027

PHILLIP H. RUDOLPH
GARE A. SMITH
DANIEL FELDMAN
Foley Hoag LLP
1875 K Street, NW
Suite 800
Washington, DC 20006

HAROLD HONGJU KOH
Counsel of Record
MARY J. HAHN
Allard K. Lowenstein
International Human
Rights Clinic
127 Wall Street
New Haven, CT 06520

Counsel for Amici Curiae

January 14, 2004

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

Nos. 03-334; 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *ET AL.*,
Petitioners,

v.

GEORGE W. BUSH, *ET AL.*,
Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE*, HON. NATHANIEL R. JONES, HON. ABNER J. MIKVA, HON. WILLIAM A. NORRIS, HON. STEPHEN M. ORLOFSKY, HON. H. LEE SAROKIN, HON. HAROLD R. TYLER, JR., CONRAD K. HARPER, DEBORAH L. RHODE AND JEROME J. SHESTACK IN SUPPORT OF PETITIONERS

DAVID J. BRADFORD
Counsel of Record
STEVEN MCMAHON ZELLER
WINSTON O. HUFF
MATTHEW T. ALBAUGH
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

These cases involve the limits of the Executive's powers to detain citizens of allied countries without charge, without access to counsel, and without any right to challenge the basis for their detention before a United States judge. Amici curiae, former federal judges, former government officials and lawyers, believe that in these two cases, the Executive has advanced, and the lower courts have accepted, a core position that threatens the role of the judiciary in safeguarding the rule of law in our national government. Therefore, pursuant to this Court's Rule 37.3, amici respectfully submit this brief in support of the petitioners Safiq Rasul, *et al.*, and Fawzi Khalid Abdullah Fahad Al Odah, *et al.*[2]

Hon. Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002. Prior to taking the bench, he served as General Counsel, National Association for the Advancement of Colored People (NAACP) from 1969 to 1979, and as Co-Chair, U.S. Department of Defense Civil-Military Task Force on Military Justice in 1972.

Hon. Abner J. Mikva served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as Chief Judge from 1991 to 1994. He also served as White House Counsel from 1994 to 1995. Prior to taking the bench, he served five

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[1] All parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, Amici state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than Amici and their counsel contributed monetarily to the preparation or submission of this brief.

[2] Case Numbers 03-334 and 03-343, respectfully.

terms as a member of Congress, representing portions of Chicago and its suburbs.

Hon. William A. Norris served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

Hon. Stephen M. Orlofsky served as a judge on the United States District Court for the District of New Jersey from 1996 to 2003.

Hon. H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

Hon. Harold R. Tyler, Jr. served as a judge on the United States District Court for the Southern District of New York from 1962 to 1975. He has also served as the Deputy Attorney General of the United States, an Assistant Attorney General of the United States Department of Justice Civil Rights Division, and an Assistant United States Attorney.

Conrad K. Harper, a lawyer in private practice in New York City, served as Legal Adviser of the United States Department of State from 1993 to 1996 and is currently a member of the Permanent Court of Arbitration at The Hague. He has previously been a member of and held leadership positions in a range of other bar, human rights and international organizations.

Deborah L. Rhode is the Ernest W. McFarland Professor of Law at the Stanford University School of Law and served as Senior Counsel to Minority Members of the Judiciary Committee of the U.S. House of Representatives in 1998.

Jerome J. Shestack, a lawyer in private practice in Philadelphia, served as president of the American Bar Association and in numerous other leadership positions of the ABA, including chair of the Section on Individual Rights and Responsibilities.

SUMMARY OF THE ARGUMENT

In these consolidated cases, the Government maintains that the judiciary may not even inquire as to justifications, since the courthouse door is forever closed to foreign nationals who have not set foot within the "ultimate sovereignty" of the United States. The Government's position is misguided as these cases contemplate indefinite Executive detention without adequate process. While the process due will vary with the circumstances, in no event may the Executive claim the unfettered power to imprison people indefinitely – that is, unless that power is checked by affording the prisoners the correlative right to the rule of law.

The Petitioners seek judicial review of their indefinite incarceration by the Executive Branch of government. The decision of the Circuit Court below disregards one of the most basic and fundamental foundations of our system of government: the rule of law. In addition, the court below, in granting unprecedented deference to the decisions and statements of the Executive Branch, has ignored the responsibilities of the judiciary fairly and adequately to review those decisions when faced with a *habeas corpus* petition.

Amici recognize the paramount importance of our national safety. Amici also share the strong desire that our Government enjoy the necessary power and flexibility to prevent future terrorist attacks. But Amici respectfully suggest that the Due Process Clause is not

an enemy of those efforts. Rather, it is an integral part of the values and liberty that this nation holds dear. Amici respectfully suggest that we should not forsake this defining heritage.

Section I of this amicus brief demonstrates that the Court of Appeals' decision is contrary to the rule of law and ignores the purposes of the Great Writ in protecting the rule of law. Section II demonstrates that providing petitioners with due process will not interfere with legitimate military interests. Section III demonstrates that, contrary to the decision below, no policy or precedent warrants denying basic due process rights to citizens of friendly nations imprisoned by and in a territory under the exclusive jurisdiction and control of the United States.

ARGUMENT

I. THE DECISION OF THE COURT BELOW IS CONTRARY TO THE RULE OF LAW AND IGNORES THE PURPOSES OF THE GREAT WRIT IN PROTECTING THE RULE OF LAW

It is fundamental that the government may not take the life, liberty or property of a person without authority from the law itself. This fundamental precept is one of the cornerstones of our democracy. The Court of Appeals' decision below has ignored the important role that the rule of law must play in times of crisis as well as peace.

A. The Decision Below Is Contrary to the Rule of Law

The rule of law broadly encompasses both "procedural and substantive" limitations on government power. Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 457 (2003). It is generally agreed that

the rule of law requires: 1) the supremacy of legal authority over officials as well as ordinary citizens; and 2) the availability of the courts to enforce the law and employ fair procedures. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 (1997). When officials act to deprive individuals of liberty without legal authority and seek to deny the availability of the courts to review their actions, the rule of law is violated.

Petitioners in these cases have been subjected to indefinite detention by the Executive, under conditions created by the Executive and will most likely not face any sort of judgment regarding their continued detention. This consolidation of power is antithetical to the rule of law and our Founders warned against circumstances such as these in advocating for the adoption of our Constitution: "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47 (James Madison). Instead of an absolute executive, our system is a system of checks and balances. *Nixon v. United States*, 506 U.S. 224, 234-35 (1993).

It has been a hallmark of Anglo-American legal tradition that an independent and impartial judiciary be available to protect against abuses of power carried out by the Executive. The guarantee that no man should be deprived of his liberty or property without review by the judiciary was extracted from King John and enshrined in the Magna Carta. The availability of fair and impartial courts to enforce the law is of particular importance in the American tradition and this Court has recognized that importance throughout its long history. *See*

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

Courts must also remain faithful to the rule of law, particularly when the popular political will calls for its elimination. In a case related to the treason trial of former Vice-President Aaron Burr, Chief Justice Marshall recognized that circumstances in which popular passions are high required more from the judiciary: "[a]s there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807) (Marshall, C.J.).

The rule of law demands that the judicial process function in both times of crises and times of calm. Chief Judge Cranch's words in *United States v. Bollman*, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622), provide guidance in these proceedings:

> [i]n times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times

> more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude. Whenever an application is made to us in our judicial character, we are bound, not only by the nature of our office, but by our solemn oaths, to administer justice, according to the laws and constitution of the United States. No political motives, no reasons of state, can justify a disregard of that solemn injunction. In cases of emergency it is for the executive department of the government to act upon its own responsibility, and to rely upon the necessity of the case for its justification; but this court is bound by the law and the constitution in all events.

Bollman, 24 F. Cas. at 1192 (Cranch, C.J., dissenting).

Courts are entrusted with the duty of upholding the rule of law in the face of political or popular attempts to erode it. As the first Justice Harlan stated: "[i]t will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds

lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution." *Downes v. Bidwell*, 182 U.S. 244, 382 (1901) (Harlan, J., dissenting). The detention of the Petitioners should be subjected to plenary review by this Court to ensure that the rule of law and our system of checks and balances prevail.

B. The Writ of Habeas Corpus Provides Petitioners with Judicial Review of Executive Branch Detentions

The writ of habeas corpus is a fundamental right critical to ensuring access to the rule of law. As Blackstone explained, the writ requires the government to furnish to a court a legal basis for its decision to deprive an individual of liberty:

> the glory of the English law consists in clearly defining the times, the causes, and the extent when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *133. The objective of the writ "is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.). The writ upholds the rule of law "since it is the

appropriate remedy to ascertain whether any person is rightfully in confinement or not." Joseph Story, *Commentaries on the Constitution of the United States* § 1333 (1833).

It is undisputed that the writ applies to persons who have been detained pursuant to the orders of the Executive Branch. In fact, a more searching inquiry is appropriate in a habeas proceeding challenging the actions of Executive officials than when habeas is invoked as a remedy for post-conviction relief. *See Developments in the Law – Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1238 (1970) ("While habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.").

The Framers of our Constitution specifically limited the situations in which the writ could be curtailed. *See*, U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). The Framers only provided the legislature with the power to suspend the writ. This ensured that an Executive with the power to detain could not on his own deprive the detained individual from having the detention examined by court. Past attempts by the Executive Branch to suspend the writ have met with judicial resistance. *Ex parte Merryman*, 17 F. Cas. 144, 148 (Cir. Ct. Md. 1861) (No. 9,487) (Taney, C.J.) ("I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus . . . ."). The Legislative Branch has not suspended

the writ. This Court should not countenance a *de facto* suspension by the Executive Branch.

II. PROVIDING PETITIONERS DUE PROCESS WILL NOT INTERFERE WITH LEGITIMATE MILITARY INTERESTS

The Executive asserts that undefined and amorphous exigencies of military conflict warrant the creation of a black hole in which the rule of law has limited, if any, application. The Executive's argument ignores the time honored principle, forged in the heat of prior armed conflicts, that combat does not eviscerate the Constitution. "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring).

The plan of divided and limited government set forth in our Constitution is, first and foremost a guarantee of liberty. The Constitution is applied "equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866); *accord United States v. Robel*, 389 U.S. 258, 263-64 (1967). Courts and their procedural safeguards were established by our founders to protect civil liberties. *Ex parte Quirin*, 317 U.S. 1, 19 (1942). The founders were categorically opposed to a system of government that would place in the hands of one man the power to make, interpret and enforce the laws. To guard against arbitrary executive detentions of the kind the Framers feared, the Constitution imposes multiple structural safeguards, including the right of habeas corpus, which subjects executive detention to review by an independent

judiciary. The right to habeas corpus was one of the few individual fights enshrined in the Constitution itself. Although habeas today typically involve collateral review of state convictions, at its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention. *Brown v. Allen*, 344 U.S. 443, 533 (1953) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.").

Of course, the Constitution is not a suicide pact. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Through the Suspension Clause, the Constitution provides a remedy for situations of rebellion or invasion when the nation temporarily cannot afford habeas. However, the Suspension Clause resides in Article I. Only Congress, not the President, has the power to suspend judicial scrutiny of executive detention. U.S. CONST. art. I, § 9 cl. 2. Vesting the power to suspend habeas corpus in the Legislature serves two important purposes. First, it ensures that no branch of government has the unilateral power to deprive persons of liberty. Second, it vests this important decision in the more representative branch. Therefore, the Constitution ensures that the power of habeas corpus to act as a restraint on executive detention is not an empty promise, as it would be if the Executive had the unilateral authority to exempt its own actions from judicial review.

Amici do not dispute that federal courts should afford deference to the Executive in matters related to the military and the conduct of the national defense. However, this deference is not unlimited. It diminishes by the degree to which the conduct at issue is remote from the threat alleged by the Executive to justify its actions; "[a]s necessity creates the rule, so it limits its

duration." *Ex parte Milligan*, 71 U.S. at 121-22 (finding military trial of a citizen to be unconstitutional in a state whose courts were open, "needed no bayonets to protect it, and required no military aid to execute its judgments"); *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946). The Executive Branch's authority with respect to war powers and national security does not make immune from judicial inquiry actions by the Executive Branch in the name of war powers or national security. *Morrison v. Olson*, 487 U.S. 654, 690 (1988).

The right to habeas corpus review is intended to check both military and civilian authority. James Madison stated that "unless these [military and civilian] departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." THE FEDERALIST NO. 48 (James Madison); *see also Parisi v. Davidson*, 405 U.S. 34, 49 (1972) ("One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds.")

Courts that have addressed habeas corpus petitions in similar contexts have consistently expressed little reticence to exercise judicial review. Justice Story cautioned that the President during war "has a discretion vested in him . . . but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims." *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting).

Later, in *Sterling v. Constantin*, 287 U.S. 378 (1932), the Court affirmed that the line between permissible

discretion and law is one that must be drawn by the judiciary:

> [i]t does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the . . . [Executive] may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, . . . is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken . . . [but] the officer may show the necessity in defending an action [before the judiciary].

Id. at 400-01.

Further, in *Ex parte Quirin*, the Court rejected the notion that the Government's classification of the petitioners foreclosed their ability to challenge the legality of their detention in federal court:

> [t]he Government challenges each of [petitioner's] propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our country as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class by persons defined by the Proclamation, which aptly describes the

> character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force, no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.

Ex parte Quirin, 317 U.S. at 24-25. The Court continued by stating that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy . . . individuals." *Id.* at 25.

Still further, the Court in *Youngstown Sheet & Tube Co.* confirmed that the Founders purposefully failed constitutionally to grant the president unreviewable powers to be used as necessary in times of emergency. 343 U.S. at 588. Allowing the Executive Branch to operate under such a broad mandate would in effect make the president a monarch during times of crisis. Justice Jackson, in his concurrence, emphasized that the only way to ensure a free government is to require the Executive to be under the law. *Id.* at 655 (J. Jackson, concurring); *see also United States v. Lee*, 106 U.S. 196, 219 (1882) ("[T]he Constitution creates no executive prerogative to dispose of the liberty of the individual."); *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) ("[T]he shield of military necessity and

national security must not be used to protect governmental actions from close scrutiny and accountability.").

This Court should thus continue a consistent legacy in providing due process to the Petitioners irrespective of a military conflict abroad.

III. NO POLICY OR PRECEDENT WARRANTS THE DENIAL OF BASIC DUE PROCESS RIGHTS TO CITIZENS OF FRIENDLY NATIONS IMPRISONED BY AND IN A TERRITORY UNDER THE EXCLUSIVE JURISDICTION AND CONTROL OF THE GOVERNMENT.

Because no compelling policy or precedent justifies closing the courthouse doors to citizens of friendly nations imprisoned by the United States without charge and without access to friends, family or counsel, this Court should reverse the Court of Appeals' decision and affirm the Judiciary's power to hear the Petitioners' challenges to their detention. The rule of law mandates that another branch of the government, whether it be the Congress or the Judiciary, must oversee and check the unilateral actions of the Executive.

The Court of Appeals' decision permits the Government to detain indefinitely certain Petitioners without a forum to dispute the legality of their detention and without access to even the most basic of due process rights. *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003) ("The consequence is that no court in this country has jurisdiction to grant habeas relief."). This dubious decision is based upon the premise that Petitioners have not technically set foot within the "ultimate sovereignty" of the United States, although the

Petitioners are purposely[3] imprisoned just ninety miles south of the Florida border at Guantanamo Bay, a territory under the exclusive control and jurisdiction of the United States. Elevating form over substance, the Government argues that denying Petitioners court access and withholding all constitutional rights is proper because the "ultimate sovereignty" over Guantanamo Bay rests with Cuba.

By agreeing with the Government's argument, the court below misread and over-extended relevant precedent, failed to reconcile decisions involving other territories over which the United States has jurisdiction and control, afforded the Executive unchecked and unreviewable authority over nonresident aliens of friendly nations and failed to recognize the flexible application of the Due Process Clause.

A. The Court of Appeals' Decision Extends *Johnson* Beyond Its Proper Holding and Fails to Reconcile Conflicting Opinions Affording Rights to Nonresident Aliens in Territories Outside the "Ultimate Sovereignty" of the United States.

In denying Petitioners all access to American courts, the court below extended precedent beyond its proper holding and failed to reconcile cases wherein limited constitutional rights were granted to nonresident aliens outside of the United States' ultimate sovereignty.

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[3] American College of Trial Lawyers, *Report on Military Commissions for the Trial of Terrorists* 8 (Mar. 2003) ("[T]he placement of the detainees at Guantanamo, w[as] carefully designed to evade judicial scrutiny and to test the limits of the President's constitutional authority.").

The Court of Appeals' decision in relies heavily upon a strained reading of this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the Court held that German war criminals convicted and sentenced by a lawful military commission for violating the law of war in China could not seek habeas relief in the federal courts. Application of *Johnson* to Petitioners' cases is inappropriate because Petitioners here are not convicted war criminals, have not been charged with any crime and are not enemy aliens. Rather, Petitioners are citizens of nations friendly to our Government. And, unlike *Johnson*, Petitioners here are being held in a territory under the exclusive possession and control of the United States government.

By tying the federal court's jurisdiction to an artificial "ultimate sovereignty" test, the Court of Appeals elevates form over substance. Although Cuba retains titular sovereignty over the military base, the United States alone exercises power, control and jurisdiction over Guantanamo Bay and refuses to recognize the authority of any international tribunal or foreign court. In Guantanamo Bay, the United States has all "the basic attributes of full territorial sovereignty." *Duro v. Reina*, 495 U.S. 676, 685 (1990). This includes "the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Id.*

The decision in *Al Odah* also conflicts with a long line of decisions relying upon this Court's decision in the *Insular Cases*, a series of cases from *Delima v. Bidwell*, 182 U.S. 1 (1901), to *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Various courts have afforded the protection of fundamental constitutional rights to residents, aliens and citizens of similar territories, where the United States exercises control and jurisdiction but does not have

ultimate sovereignty. *See, e.g., United States v. Husband R. (Roach)*, 453 F.2d 1054, 1057-61 (5th Cir. 1971) (holding the Due Process Clause is applicable to government action taken against an alien in the Panama Canal zone, an area leased by the United States); *Juda v. United States*, 6 Cl. Ct. 441, 458 (1984) (finding Takings Clause applicable to both aliens and citizens of Marshall Islands and holding that "[a]ll of the restraints of the Bill of Rights are applicable to the United States wherever it has acted"); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977) (holding fundamental constitutional rights applicable to non-resident of Trust Territory of the Pacific Islands, a territory under the complete control and jurisdiction, but not ultimate sovereignty, of the United States); *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) (extending constitutional rights to non-resident aliens within American sector of Berlin, Germany).

Here, the Court of Appeals' decision encourages manipulation of the legal process and strips the courts of jurisdiction under the guise of deferring to Cuba's titular, but unexercised, sovereignty.

B. The Court Should Reverse the Court of Appeals' Decision and Uphold the Judiciary's Power to Review the Unilateral Actions of the Executive Branch in Recognition of the Due Process Clause's Flexible Application.

By concluding that it was without authority to determine what process, if any, is due to Petitioners, the Court of Appeals in *Al Odah* also ignored the enormous practical flexibility which the Due Process Clause permits in its application. The Due Process Clause requires only such process as is due under the circumstances. *See Heller v. Doe*, 509 U.S. 312, 332 (1993) ("[F]lexibility is

necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.") (quoting *Greenholtz v. Inmates of Nev. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979)); *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (holding the process required depends on the balance of interests at stake).

Such flexibility ensures that the threshold determination – whether the Due Process Clause applies – will not compel imprudent results in circumstances involving national security. At its very core, the rule of law ensures that "there exists a fair, rational, process through which one can protect one's interest." James W. Torke, *What Is this Thing Called the Rule of Law?*, 34 IND. L. REV. 1445, 1447 (2001). Territorial considerations or the citizenship of the persons seeking due process alone should not be an exclusive basis for avoiding the provision of due process altogether. Rather, the key determination depends on the process rightfully due under the circumstances:

> [t]he proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place . . . [T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is "due" a defendant in the particular circumstances of a particular case.

Reid v. Covert, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring) (emphasis in original). In the present case, where the Government actively denies Petitioners all

liberty rights whatsoever, the "particular circumstances" cry out for the extension of at least the most basic of due process rights, including the right fairly to contest the legitimacy of their detention. The Government has denied Petitioners all basic due process rights for almost two years, and it argues that this Court should condone this limbo for an indefinite period.

In addition, the decision of the Court of Appeals ignores that the Government has alternatives for dealing with circumstances of war. It may treat detainees as prisoners of war, in which case the Geneva Convention would apply. It may also prosecute them under procedures specifically designed to safeguard national security. *See United States v. Bin Laden*, No. 98-Cr-1023, 2001 U.S. Dist. LEXIS 719 (S.D.N.Y. Jan. 25, 2001) (limiting access to confidential information). The Congress may suspend the Great Writ. Each of these courses permits detentions that are consistent with the rule of law. Instead, the Court of Appeals decision helps create an unprecedented alternative – a territory where the Executive may indefinitely imprison citizens of friendly nations without any compliance with the Geneva Conventions or any other rule of law of any kind. The notion that it is necessary to embrace lawlessness in order to defend liberty denigrates the practical wisdom of our founders in creating a tripartite sharing of authority, crafting a flexible Due Process Clause and affording Congress – not the Executive – the authority to suspend the Great Writ.

The decisions below effectively provide our Executive unbridled authority in dealings with foreign citizens whom it imprisons in light of the tragic events of September 11, 2001. But unbridled, unchecked authority

to any Executive, no matter how well-intentioned, runs counter to our system of law.

CONCLUSION

For the foregoing reasons, the this Court should reverse the judgments below.

Respectfully Submitted,

David J. Bradford
Counsel of Record
Steven McMahon Zeller
Winston O. Huff
Matthew T. Albaugh
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Counsel for Amici Curiae

Dated: January 14, 2004

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

(30) (29)

Nos. 03-334, 03-343

IN THE

Supreme Court of the United States

SHARIQ RASUL ET AL.,

Petitioners,

v.

GEORGE W. BUSH ET AL.,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF FORMER AMERICAN PRISONERS OF WAR AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

THOMAS F. CULLEN, JR.
(Counsel of Record)
CHRISTIAN G. VERGONIS
BETSY A. MILLER
FAHAD A. HABIB
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Prisoners of war are in a vulnerable situation, at the mercy of their captors and beyond the reach of their own government. Force of arms cannot protect them, and the force of law relies on a reciprocal, consensual regime of understandings among the combatant nations robust enough to be recognized and respected despite the emotions and exigencies of war. *Amici* have been in that vulnerable position, have benefited from these international understandings, and have suffered in their absence. The Geneva Conventions on the treatment of those detained in a combat zone, the body of law amplifying those Conventions, and the United States' commitment to implementing them, were, at that critical juncture, their primary protection and the only means our government had to protect them.

Amici are Leslie H. Jackson, Edward Jackfert, and Neal Harrington, former American prisoners of war detained by the German and Japanese governments during World War II. Mr. Jackson is the Executive Director of American Ex-Prisoners of War, a non-profit, congressionally chartered veterans' organization that represents approximately 50,000 former prisoners of war and their families. Mr. Jackfert is the former National Commander of the American Defenders for Bataan & Corregidor, Inc., an organization that supports former POWs held by the Japanese during World War II. Mr. Harrington is also involved in POW activities, particularly relating to those who, like he and Mr. Jackfert, survived the infamous Bataan Death March.

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[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

Mr. Jackson was captured by the German Army on April 24, 1944, when his B-17 bomber crashed. Jailed and interrogated for approximately one week, he was then transported to Stalag 17, a converted concentration camp. In his 13 months of captivity, Mr. Jackson was granted the bare necessities: shelter, minimal food, and the ability to socialize with other American POWs. While the experience was harsh and unpleasant, Mr. Jackson was never tortured or otherwise hurt by the German guards. To follow the terms of the Geneva Conventions of 1929, to which Germany was a party, Mr. Jackson's German captors placed the appropriate Geneva Convention signage in the barracks, permitted the International Red Cross to ship basic necessities to the POWs, and allowed a Geneva inspector to survey the premises. Mr. Jackson believes that his survival and relatively good health while in captivity are the result of the German Army's adherence to the 1929 Geneva Conventions.

The experiences of Mr. Jackfert and Mr. Harrington in the custody of Japan, which had not ratified and did not purport to follow the 1929 Geneva Conventions, offer a sharp contrast. Both men were serving with the U.S. Army in the Philippines when the surrender there to the Japanese occurred in 1942, and both subsequently served several years of hard captivity beyond the reach of any Geneva Convention protections. Both were part of the Bataan Death March and its well-documented horrors. Mr. Harrington was forced into slave labor in a Japanese coal mine, and saw his compatriots starved, beaten, and killed. Mr. Jackfert was also forced into slave labor and suffered the extreme effects of heavy labor and cruelly inadequate nourishment, going from 125 pounds to 90 pounds in a matter of months. There was no Geneva signage, no recognized prisoner rights, and virtually no Red Cross access.

Nor were the experiences of Mr. Harrington and Mr. Jackfert atypical. Studies have determined that the death rate of U.S. military personnel interned by Japan was as high as

40%, while the death rate of personnel captured and interned by Germany was little more than 1%. *See* Charles A. Stenger, *American Prisoners of War in WWI, WWII, Korea, Vietnam, Persian Gulf, Somalia, Bosnia, and Kosovo* (2000), *cited in* Gary K. Reynolds, Congressional Research Service, *U.S. Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan* 10 (updated July 27, 2001); *see also Encyclopedia of Prisoners of War and Internment* 329, 335 (Jonathan F. Vance ed., ABC-CLIO 2000) (providing similar estimates). Moreover, while it was rare for American POWs detained in Germany to be tortured, the opposite was true for American POWs in Japan. "No one can adequately impart the suffering most Allied prisoners endured [in Japan] . . . . They were beaten, kicked, robbed . . . and were buried alive. . . . [T]he overwhelming majority endured 'hell on earth'. . . ." *Encyclopedia of Prisoners of War and Internment*, *supra*, at 336.[2]

As a result of their own experiences, *amici* have an interest in fostering the development, acceptance, and enforcement of international norms pursuant to which prisoners of war and others captured during armed conflicts

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[2] Notably, the difference in treatment of American POWs was not merely the result of differences between the Germans and the Japanese. Contrary to their humane treatment of American POWs, the Germans treated prisoners from Russia, which had not ratified the Geneva Conventions of 1929, with absolute cruelty. "Of 5.7 million captured Red Army soldiers, about 3.3 million died in German captivity—a staggering mortality rate of 57 percent." *Id.* at 329. Nor was this simply a function of the harsh Russian climate. German soldiers deliberately starved Russian POWs, forced them into slave labor, and sent some to the gas chambers. *Id.* at 331. Thus, the importance of the Geneva Conventions—not simply of their existence, but of the reciprocity enjoyed by mutual parties to the Conventions—cannot, and should not, be underestimated.

will be treated humanely and in accordance with the rule of law. In particular, *amici* wish to ensure that the treatment by the United States of foreign detainees during the ongoing armed conflicts in Afghanistan, Iraq, and elsewhere is such that the United States and former American POWs retain the moral authority to demand fair and humane treatment for any future Americans detained by foreign governments. *Amici* also support the involvement of the judiciary in the development and evolution of the substantive and procedural norms protecting such persons on the conviction that a well-developed and stable body of laws and rules is more likely to result in even-handed, predictable, and humane treatment of detainees by the nations of the world.

INTRODUCTION AND SUMMARY OF ARGUMENT

To what did the United States and 142 other sovereign nations agree when they became parties to the Geneva Conventions of 1949?

> Only that [they] could not kill, or other otherwise maltreat, protected persons such as the sick and wounded, prisoners of war, and civilian noncombatants, and that [they] must meet certain minimum standards in [their] treatment of these individuals. Can any State advance the argument that it refuses to ratify such an international agreement because it does not wish to have its 'national security' jeopardized by having its sovereign power of action limited in these respects, that it wishes to retain an unfettered ability to kill and maltreat these individuals at will?

Howard S. Levie, *Prisoners of War in International Armed Conflict* in 59 Int'l Law Studies 21 (1978).

The principle that humanitarian norms apply to prisoners of war and others detained during armed conflicts has at last, following a long history of horrors in captivity, achieved near-universal acceptance. The Geneva Conventions, which were negotiated in the wake of the two World Wars, confer upon captured persons both substantive rights and the

procedural right to a judicial determination of their proper status, thereby providing a predictable level of protection to those who are among the most vulnerable of the victims of war. The widespread acceptance of, and adherence to, these common principles of international humanitarian law is due, in significant part, to the standard set by the United States in its historically fair and humane treatment of detainees.

The United States has ratified the Geneva Conventions, expressly incorporated them into its written military regulations, and adhered to them in prior conflicts. Over the past half-century, moreover, the United States has played a prominent role in demanding that detainees be treated by foreign governments in accordance with the Geneva Conventions. Recently, however, the United States' treatment of detainees captured during the war on terrorism and its reluctance to reconcile its actions with the norms of the Geneva Conventions or submit them to the scrutiny of the courts, has resulted in international skepticism and cynicism about the United States' commitment to those norms.

It is vital to the preservation of the United States' moral authority in the international community that all three branches of government demonstrate an unwavering commitment to the application of the Geneva Conventions and the principles of due process reflected therein. Contrary to the D.C. Circuit's conclusion that the courts should not be involved in this process, the development of international humanitarian law would benefit from judicial participation in the case currently before this Court. Even where executive discretion is broadest, the *fact* of judicial review is a formidable protection. There is law to apply here: impartial tribunals are particularly well-suited to determine whether petitioners' detentions comply with the procedural and substantive guarantees found in the Geneva Conventions, United States military regulations, and the United States Constitution. Indeed, the Conventions and military regulations expressly contemplate the involvement of

competent tribunals in making such determinations and were designed to avoid the exact circumstance now facing petitioners—a complete deprivation of the procedures designed to protect them until an individualized determination of their status has been made.

Even if petitioners' claims are ultimately deemed to lack merit, independent judicial review would erase the suspicion of executive overreaching and provide the international community with assurances that the United States' detentions are not arbitrary or in derogation of the Geneva Conventions.

Just as significantly, judicial review will enable the courts of the United States to contribute to the long-term development and evolution of international humanitarian law by giving meaning to, and filling the interstices in, the governing principles. This, in turn, will lead to a mature and stable body of rules that can be predictably applied by, and demanded of, all nations in all future conflicts.

Finally, judicial review is appropriate here because petitioners' claims satisfy the threshold conditions for jurisdiction and justiciability and because prior decisions of this Court indicate that constitutional protections can extend to aliens abroad. Indeed, denial of petitioners' right to test the legality of their detentions would subvert the historical scope of the Great Writ and, contrary to well-settled canons of construction, would require an interpretation of the habeas statute at odds with the United States' obligations under international law. Therefore, this Court should limit the application of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and allow judicial review of whether the Guantánamo detainees are entitled, under the U.S. Constitution, the Geneva Conventions, and the United States' own military regulations, to individualized status determinations.

ARGUMENT

I. FAILURE TO REVERSE THE DECISION BELOW WILL ENDANGER AMERICAN SOLDIERS BY UNDERMINING THE AUTHORITY OF THE UNITED STATES TO DEMAND THAT OTHER NATIONS COMPLY WITH INTERNATIONAL HUMANITARIAN LAW

The Geneva Conventions provide crucial uniformity and predictability in the standards for the humane treatment of all persons captured during armed conflict. Although the Geneva Conventions themselves do not offer protection to captured persons who are deemed "unlawful" or "enemy" combatants, they do provide an explicit mechanism for determining which individuals are eligible for protection under the Conventions. The obligation to provide a predictable status-determination process is as important as the substantive rights themselves. Without such procedural uniformity, the international community would have no power to regulate the treatment of individuals detained by enemy forces, and the capturing power would have no obligation to provide prisoners with any protections at all.

The D.C. Circuit's ruling that the judiciary shall have no role in ensuring that such procedures are afforded to foreign citizens who are captured by the U.S. military and detained outside the territorial boundaries of the United States threatens to undermine both the safety of Americans worldwide and the reputation of the United States as an exemplar in the application of humanitarian law.

A. The Geneva Conventions Require Individualized Status Determinations by Competent Tribunals

"[I]n nothing connected with war has a greater improvement been wrought than in the treatment of prisoners of war." J. V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 Miami L.Q. 40 (1950). Although an earlier Geneva Convention was ratified in 1929 and played a significant role in World War

II, *see supra* pp. 2-3 & note 2, the regime of humanitarian law in place today is based upon the four Geneva Conventions of 1949, including the Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention"), and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Fourth Geneva Convention"), both of which the United States ratified in 1955. *See* Third Geneva Convention, 6 U.S.T. 3316, 3316; Fourth Geneva Convention, 6 U.S.T. 3516, 3516.

The Third Geneva Convention provides a prisoner of war with a set of substantive rights, including humane treatment, access to Red Cross packages, postal services, and protection from interrogation, as well as the procedural right to have an individualized determination of his status as either a prisoner of war, a civilian, or an enemy combatant. The substantive protections apply to persons who are "[m]embers of the armed forces of a Party to the conflict" or "[m]embers of other militias and . . . volunteer corps . . . belonging to a Party to the conflict," provided that certain additional considerations are satisfied. *See* Third Geneva Convention, arts. 4, 6, 6 U.S.T. at 3320, 3324, 75 U.N.T.S. at 138, 142. The procedural protections ensure that if there is "*any doubt* . . . as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy" are protected by the Convention, "such persons shall enjoy the protection of the . . . Convention until such time as their status has been *determined by a competent tribunal*." *Id.* art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (emphasis added).

The Fourth Geneva Convention relates to the protection of civilians in times of war. It, too, provides both substantive rights to humane treatment and procedural rights relating to status determinations. *See* Fourth Geneva Convention, art. 43, 6 U.S.T. at 3516, 3544, 75 U.N.T.S. at 287, 314; Jordan J. Paust, *Judicial Power to Determine the Status and Rights*

of Persons Detained Without Trial, 44 Harv. Int'l L.J. 503, 511-12 (Summer 2003). In particular, with certain narrow exceptions, civilians who have been interned have the right promptly to challenge their detentions before an appropriate court or administrative board. *See* Fourth Geneva Convention, art. 43, 6 U.S.T. at 3544, 75 U.N.T.S. at 314.

The intent of these provisions is to ensure that alleged belligerents, such as petitioners, receive substantive protections unless and until their status as unlawful combatants has been determined in accordance with the rule of law. More specifically, Article 5 of the Third Geneva Convention

> serves a double purpose: (1) it prohibits the procedure sometimes followed in the past of executing first and investigating later—the individual who falls into the hands of the enemy is entitled to the protection of the Convention until the contrary is *established*; and (2) it provides for the determination of cases involving disputes as to the entitlement of individuals to prisoner-of-war status to be made by a 'competent tribunal' . . . .

Levie, *Prisoners of War in International Armed Conflict*, *supra*, at 55-56 (footnote omitted, emphasis added). These protections have not been followed with respect to the Guantánamo Bay detainees, for it cannot be said that the Executive Branch has satisfactorily "established" that each detainee is undeserving of the protections offered by the Conventions. To the contrary, the Third Geneva Convention envisions, and requires, an individualized determination by a competent tribunal for each alleged belligerent.

The principle of fair procedure is so integral to the overall scheme that the Third Geneva Convention even provides for sanctions in the case of violation:

> The real teeth of enforcement of the Convention, supplementing the usual sanctions of International Law, i.e., condemnation of world public opinion and fear of reprisal, is found in Articles 129 and 130 wherein it is

> prescribed that the signatory nations shall undertake to enact any legislation necessary to provide effective penal sanctions for persons . . . willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Convention.

Dillon, *supra*, 5 Miami L.Q. at 62 (citing Third Geneva Convention, arts. 129 & 130, 6 U.S.T. at 3418, 3420, 75 U.N.T.S. at 236, 238). Moreover, at the 1949 Geneva Conventions conference, the United States took the position that "the essential guarantees of a fair trial should be provided all prisoners of war and conventionally prescribed treatment should even be applicable after conviction." *Id.* at 58. While the United States' position at the conference did not specifically address the procedural question of a suspected unlawful combatant's right to a status determination, it did underscore the United States' clear intention to uphold principles of due process, even in wartime and even against war criminals.

In sum, in addition to providing one set of substantive rights for prisoners of war and another set for civilians, the Geneva Conventions also guarantee procedural protections—including the involvement of competent tribunals—to ensure that detained individuals are categorized properly and that they receive the substantive protections to which they are entitled based on their particular status. Pursuant to the Geneva Conventions,

> [e]very person in enemy hands must have some status under international law: he is either a prisoner of war . . . covered by the Third Convention, a civilian covered by the Fourth Geneva Convention or . . . a member of the medical personnel . . . covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.

J. S. Pictet, *Commentary of the Fourth Geneva Convention* 51 (Geneva: International Committee of the Red Cross 1952); *see also* Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, 27 Fletcher F. World Aff., Summer/Fall 2003, at 55, 57.

B. The Government's Treatment of the Guantánamo Bay Detainees Is Inconsistent With the United States' Past Adherence to the Geneva Conventions

The United States has chosen to implement the Geneva Conventions as part of its written military regulations. Thus, Army Regulation 190-8 states:

> [I]n accordance with Article 5, [Geneva Convention III] . . . [a] competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities . . . and who asserts that he or she is entitled to treatment as a prisoner of war . . . .

U.S. Army Regulation 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees," § 1-6, Depts. of the Army, the Navy, the Air Force, and the Marine Corps, Washington, D.C. (Oct. 1, 1997); *see also id.* §§ 5-1b & 5-1g(1) (requiring status determinations by a competent tribunal and providing a right to appeal for interned civilians). These regulations provide an explicit legal process that requires an individualized status determination without exception, and the regulations define the roles and authority of officers in the field and their reviewing authorities.

The United States has put its commitment to these norms into practice in past conflicts by providing procedural protections to verify the status of detainees. After the United States commenced its occupation of Germany at the close of World War II, the military made it an officially published objective "to insure that persons [were] not imprisoned, detained or otherwise punished by German authorities without due process." *Id.* at 72-73 (internal citations omitted). This commitment by the United States to fair legal process made a significant impression on the Germans:

> The complete bewilderment of the average German during legal proceedings before Military Government Courts has been observed . . . . The two ideas which were most startling and inconceivable to the defendants were the opportunity afforded them to be heard and to say what they wished, without fear or compulsion, and the right accorded them to present evidence and witnesses on their own behalf.

Eli E. Nobleman, *The Administration of Justice in the United States Zone of Germany*, 8 Fed. Bar J. 70, 73 (1946).

The United States codified procedural protections for detainees in 1956, providing for "a competent tribunal" to determine the status of

> any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.

U.S. Dep't of the Army, Field Manual on the Law of Land Warfare, FM 27-10 § 71(a) (1956). Until the recent conflicts in Afghanistan and Iraq, the use of tribunals for status determinations had been a consistent component of U.S. policy ever since.

For example, during the Vietnam War, the Military Assistance Command, Vietnam ("MACV"), which ran the U.S. Judge Advocate office in Vietnam, established tribunals under Article 5 of the Third Geneva Convention to determine the enemy combatant, prisoner-of-war, or civilian status of each captured person. *See* MACV Directive No. 20-5, § 5(e) (Sept. 21, 1966, as amended, Dec. 16, 1966), *cited in* Prisoners of War, 10 Whiteman *Digest* § 7, at 216 (1968) ("[i]n . . . doubtful cases the necessity for a determination of status by a tribunal may arise"). The MACV directive made it clear that "the responsibility for determining the status of persons captured by U.S. forces rests with the United States"

and that "[a] tribunal was needed only for a detained person whose legal status was in doubt. This was often the case in Vietnam . . . as rarely did the Viet Cong wear a recognizable uniform . . . . [and] some combat captives were compelled to act for the Viet Cong out of fear of harm to themselves or their families." Frederic L. Borch, *Judge Advocates in Combat* 20-21 (2001).

During the 1983 conflict in Grenada, the United States military again applied the Geneva Conventions. In deciding how to handle the status determinations of each captured person, Army lawyers, in conjunction with the Department of Defense and the Department of State

> determined that the [Third Geneva Convention] applied and that all persons captured should be treated as prisoners of war. This was a significant decision. Individuals afforded prisoner of war status actually receive more rights and privileges than persons placed in a 'retained status' or civilian internees. Thus, although the United States recognized the convention's differentiation between prisoners of war, retained personnel, and civilian internees, *all individuals taken into military custody were regarded as prisoners of war and treated as such until a more informed determination of their status could be accomplished.*

Id. at 66 (emphasis in original omitted and emphasis added, footnote omitted).

Similar practices were followed in other armed conflicts, such as those in Panama and Haiti and the 1991 Persian Gulf war. *See, e.g.*, Maj. Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Obligations Other Than War*, 159 Mil. L. Rev. 152, 168 (1999) ("The U.S. Army afforded all detainees [in Panama] the rights and protections of the Geneva Conventions until their precise status was determined following an Article 5 tribunal."); Office of the Staff Judge Advocate, 10th Mountain Division

(Light Infantry), *Operation Uphold Democracy, Multinational Force Haiti After-Action Report, 29 July 1994–13 January 1995*, at 9 (May 1995) (explaining that the Multinational Force in Haiti "afforded detainees treatment of prisoners of war and due process protections of human rights instruments" as well as Haitian law), *cited in* Center for Law & Military Operations, U.S. Army, *Law and Military Operations in Haiti, 1994-95: Lessons Learned for Judge Advocates*, at 68 n.225 (Dec. 10, 1995), *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf; Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War*, at 578 (1992) (noting that the status of almost 1200 enemy detainees from the 1991 Persian Gulf War was determined by tribunals).

As these examples show, the use of tribunals traditionally has been an integral component of the United States' treatment of persons captured on enemy soil. The Government's current practice of imprisoning foreign citizens indefinitely without providing them with an individualized determination of their status represents a sharp break with this historical commitment. Allowing access to the courts is the only means for these detainees to achieve the narrow redress they seek—individualized determinations of their status as required by the Geneva Conventions and U.S. military regulations.

Furthermore, the long-term development and stability of international rules governing the rights of detainees will benefit from judicial review. Courts serve as an important check against arbitrary executive-branch excesses. Moreover, courts applying common-law methodologies are particularly well-equipped to interpret texts such as the Geneva Conventions and U.S. military regulations, and to apply them, without fear or favor, where appropriate based on particular facts. A body of adjudication, and the concomitant creation of more law, would therefore further the fundamental goal of the Geneva Conventions that detainees captured during wartime are treated in accordance

with a stable body of rules that can be predictably applied by, and demanded of, all nations.

C. The Government's Policy In Guantánamo Bay Will Undermine the United States' Ability to Demand Compliance by Other Nations

The United States' moral authority to demand international compliance with the norms expressed in the Geneva Conventions depends on the United States' own demonstrable and principled compliance with these norms, and availability of judicial review is a key component in supporting the United States' moral authority. History shows the value of this moral authority, as the United States has relied upon it many times to demand that other nations treat American and allied prisoners in accordance with the principles of the Geneva Conventions.

For example, during World War I, the United States protested the ill-treatment of American prisoners of war in Germany and demanded that the German government "immediately take such steps as will effectively guarantee to American prisoners in its hands, both in letter and in spirit, that humane treatment which by all the principles of international law and usage is to be expected from the Government of a civilized state and its officials." Secretary of State (Lansing) to the Ambassador in Spain (Willard), telegram 850, Jan. 28, 1918, MS. Department of State, file 763.72114/3240a; 1918 For. Rel., Supp. 2, p. 19, *cited in* Prisoners of War: Treatment, 6 Hackworth *Digest* § 577, at 278 (1943).

Similarly, during World War II, the United States, through Secretary of State Cordell Hull, severely warned Japan that its leaders and citizens would be held accountable for the maltreatment of U.S. and allied soldiers, including the atrocities committed in the Bataan Death March and the abuse of Filipino civilians. *See* 203 Judgment Of The International Japanese War Crimes Trials In The International Military Tribunal For The Far East 49,748

(1948), *cited in* Maj. Michael L. Smidt, *Yamashita, Medina & Beyond: Command Responsibility in Contemporary Military Operations*, 164 Mil. L. Rev. 155, 174 (2000).

When America went to war in Vietnam, the Government recognized that adherence by the United States and its allies to the Geneva Conventions could be used as leverage with the Viet Cong for reciprocal humane treatment of American soldiers. Thus, Secretary of State Rusk stated unequivocally that "[t]he United States Government has always abided by the humanitarian principles enunciated in the Geneva conventions and will continue to do so." Letter from Secretary of State Rusk to Jacques Freymond, Vice President of the International Committee of the Red Cross, reprinted in LIII *Bulletin*, Department of State, No. 1368, Sept. 13, 1965, p. 447, *cited in* Prisoners of War, 10 Whiteman *Digest* § 7, at 214-15 (1968). Moreover, high-ranking military staff "quickly concluded that the Viet Cong might reciprocate with better treatment of U.S. captives if South Vietnam [were to change its treatment of Viet Cong prisoners]." U.S. military officials felt that "[a] unilateral decision by the Saigon government to acknowledge the applicability of the [Geneva Conventions] might . . . 'ameliorate domestic and international criticism of the war.'" Borch, *Judge Advocates in Combat*, *supra*, at 11 (quoting Jeffrey J. Clarke, *Advice and Support: The Final Years, 1965-1973* at 120 (1987)). Ultimately, South Vietnam did change its treatment of Viet Cong prisoners and "the humane treatment eventually afforded Viet Cong and North Vietnamese Army prisoners exerted constant pressure on the enemy to reciprocate, and more American soldiers and airmen did begin to survive capture." *Id.* at 12 (citations omitted).

Following Iraq's invasion of Kuwait in August 1990, the United States joined other members of the U.N. Security Council in "[c]ondemning the actions by the Iraqi authorities and occupying forces to take third-State nationals hostage and to mistreat and oppress Kuwaiti and third-State nations . . . in violation of . . . the [Fourth] Geneva Convention" and

other international agreements. U.N. S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/RES/674 (1990).

And most recently, in response to the televised display of captured American soldiers by Iraqi authorities, U.S. officials universally chastised this conduct as a violation of the principles of the Geneva Conventions. President Bush stated simply: "I expect [the U.S. prisoners of war] to be treated humanely . . . just like we're treating the prisoners that we have captured humanely. If not, the people who mistreat the prisoners will be treated as war criminals." White House Release, President Discusses Military Operation (Mar. 23, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/03/20030323-1.html. Deputy Secretary of Defense Paul Wolfowitz, in a similar note, contrasted Iraqi treatment of prisoners with treatment accorded by the United States:

> We've seen those scenes on Al Jazeera that others have seen. We have reminded the Iraqis . . . that there are very clear obligations under the Geneva Convention to treat prisoners humanely, not to humiliate them, and in this case, I think we'll be in a position before long to enforce any violations of the Geneva Convention. We treat our own prisoners, and there are hundreds of Iraqi prisoners, extremely well. We feed them, we take care of them, they're very safe with us.

Department of Defense News Transcript, Deputy Secretary Wolfowitz Interview with New England Cable News (Mar. 23, 2003), *available at* http://www.defenselink.mil/transcripts/2003/t03242003_t0323nec.html.

As this historical record shows, U.S. treatment of enemy prisoners in accordance with the principles of the Geneva Conventions has been a powerful basis for U.S. demands that American soldiers receive the same standard of treatment. General Eisenhower pithily explained this reasoning in his response to an inquiry by a Soviet general as to why the

United States expended a high level of effort in its treatment of German prisoners:

> [I]n the first place my country was required to do so by the terms of the Geneva Convention. In the second place, the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he already was doing.

Dwight D. Eisenhower, *Crusade in Europe* 469 (1949). General Eisenhower's reasoning remains just as valid today.

The United States has enjoyed a long history as a leader in worldwide democracy, humanitarian law, and human rights law. But these past accomplishments and the principles of past conduct do not seem compelling to other nations that have begun to rely on the United States' recent practices as excuses for their human rights abuses:

> African leaders with reputations for political intolerance have learned to use the war against terror as a justification for clamping down on the opposition. Uganda's president . . . and Zimbabwe's [president] . . . have on several occasions referred to their respective opposition elements as terrorists. Platitudes used in speeches by [President Bush] and [Israeli Prime Minister Sharon] have become favorite phrases of African leaders who say they want to "wipe out" or "liquidate" or "crush" the "infrastructure of terror."

See Shehu Sani, *U.S. Actions Send a Bad Signal to Africa Inspiring Intolerance*, Int'l Herald Trib., Sept. 15, 2003; *see also id.* (noting "[t]he insistence by the Bush administration on keeping Taliban and Al Qaeda captives in indefinite detention in Guantánamo Bay . . . helps create a free license for tyranny in Africa").

The United States cannot afford to tarnish its reputation as the standard-bearer for democracy and human rights. If it does, it puts at risk the safety of the men and women of the

U.S. armed forces and its own ability to insist on compliance by other nations with the norms of the Geneva Conventions.

II. THIS COURT SHOULD LIMIT THE SCOPE OF *JOHNSON V. EISENTRAGER*

The decision below creates serious problems and inconsistencies in U.S. legal doctrine. The D.C. Circuit's conclusion that "no court in this country has jurisdiction" to hear the claims of alien detainees captured by the United States military during armed conflict and held outside of the territory of the United States (Odah App. at 14) cannot be reconciled with settled rules of justiciability; it improperly conflates questions of jurisdiction with merits determinations; and it subverts the proper scope of the Great Writ for those who seek to test the legality of their detentions.

The threshold conditions for *jurisdiction* are plainly satisfied here. The detainees have standing to sue, as they have suffered concrete injury (a restriction of liberty without certain procedural protections) caused by the defendants and redressable by the relief sought. And their lawsuits, premised on claims of right arising under the Constitution, treaties of the United States, federal law, and federal military regulations, undeniably present federal questions.

Moreover, there exists a statutory cause of action for vindication of those rights. The federal habeas statute allows a district court to grant the writ to a prisoner if, *inter alia*, "[h]e is in custody under or by color of the authority of the United States" or "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c). As a textual matter, the applicability of § 2241 is clear. Indeed, as this Court has observed, challenges to executive detentions invoke the Great Writ's protections in their purest form. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention"); *id.* at 303-04 (noting "the

historical use of habeas corpus to remedy unlawful executive action" and "to redress the improper exercise of official discretion").

In denying the detainees recourse to the courts, the D.C. Circuit, relying primarily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), reasoned that the detainees have no substantive rights under U.S. law and therefore "cannot invoke the jurisdiction of [U.S.] courts to test the constitutionality or the legality of restraints on their liberty." (Odah App. at 16.) But it is well-settled that the existence *vel non* of a claim of right is separate from the question of subject-matter jurisdiction. *See Bell v. Hood*, 327 U.S. 678, 682-83 (1946). The Court should accordingly clarify that any suggestion to the contrary in *Johnson* is not the law.

Moreover, the D.C. Circuit's broad conclusion that, under *Johnson* and this Court's other precedents, alien detainees have *no* rights when detained by the United States military is wrong. While this Court's prior pronouncements on the applicability of the Constitution to aliens abroad have been somewhat unclear, this Court has never held that the rights of such aliens are non-existent. The Court's prior cases rejected only specific claims: *Johnson* held that prisoners of war did not have a right to be tried by civil, rather than military, tribunals, *see* 339 U.S. at 782-83, 785, and *United States v. Verdugo-Urquidez* held only that the Fourth Amendment did not apply to searches of foreign residences, *see* 494 U.S. 259, 275-76 (1990). Neither case held categorically that the Due Process Clause of the Fifth Amendment places *no restraints at all* on the Government's power to detain an alien indefinitely, without notice or an opportunity to contest before a competent tribunal the facts underlying that detention. To the contrary, in discussing the "coverage of our Constitution to nonresident alien enemies," *Johnson* acknowledged that alien enemies are "*entitled*" to precisely what petitioners seek here—a "judicial hearing to determine" their status. 339 U.S. at 784 (emphasis added).

Similarly, concurring in *Verdugo-Urquidez*, Justice Kennedy explained that courts must engage in a case-by-case adjudication of the extent to which constitutional limitations on the power of the United States must yield to other considerations, implying that some constitutional restrictions do apply when the Government acts on aliens abroad. *See* 494 U.S. at 277-78 (Kennedy, J., concurring) (noting that "[t]he proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances" (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring))); *see also id.* at 277 ("when the Government acts, in reference to an alien, within its sphere of foreign operations," the Court "must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad"). It is precisely the sort of case-by-case adjudication anticipated by Justice Kennedy that the decision below forestalls.

Moreover, this Court has recognized that even where a specific constitutional right does not apply, a similar right can be made applicable to an alien abroad by "the political branches through diplomatic understanding, treaty, or legislation." *Verdugo-Urquidez*, 494 U.S. at 275. The rights asserted by petitioners here were created by the political branches and, as discussed above, find expression in, among other things, the Geneva Conventions, which have been ratified by the United States, and in the Army regulations, which "implement[]" the Geneva Conventions, *see* Army Regulation 190-8 § 1-1*b*; *see also id.* § 1-1*b*(4) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.").

Indeed, the writ of habeas corpus has "traditionally issued as a means of reviewing the legality of the detention of aliens in the face of alleged treaty violations." *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 221 (3d Cir. 2003); *see also Mali v.*

Keeper of the Common Jail, 120 U.S. 1, 11 (1877) (considering habeas corpus petition brought on behalf of alien sailor alleging violations of consular agreement between the United States and Belgium). Thus, in other contexts, the circuit courts have agreed that habeas relief is available under § 2241 for an individual who claims his continued detention violates a treaty, at least where the treaty has been implemented by federal law and regulations. *See, e.g.*, *Ogbudimkpa*, 342 F.3d at 221 & n.24; *Wang v. Ashcroft*, 320 F.3d 130, 141 n.16 (2d Cir. 2003); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003). Similarly, courts "review military determinations by habeas corpus to insure that rights guaranteed by . . . military regulations are protected." *Allgood v. Kenan*, 470 F.2d 1071, 1073 (9th Cir. 1972); *see also Ornato v. Hoffman*, 546 F.2d 10, 14 (2d Cir. 1976) (noting that "habeas corpus is available . . . where there is a breach [by the military] of a self-imposed procedural regulation").[3]

An interpretation of the habeas statute denying detainees access to the courts, at least where, as here, no alternative tribunals have been established, would also run afoul of the canon of statutory interpretation that "an act of Congress

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[3] That the military has implemented the Geneva Conventions in its regulations obviates the need to address whether the Conventions would otherwise be enforceable in U.S. courts. While the general rule is that a treaty must be "self-executing" to give rise to a cause of action, it is unclear whether this rule bars the assertion of treaty rights where another statute, such as § 2241, creates the cause of action. *See Ogbudimkpa*, 342 F.3d at 218 n.22 (explaining, but sidestepping, "the interesting issues . . . with respect to the availability of habeas relief under a non-self-executing treaty absent implementing legislation."). Whether the Geneva Conventions are self-executing is also unsettled. *See, e.g.*, *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) (concluding that certain provisions of the Geneva Conventions are enforceable by POWs in court).

ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *see also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963) (avoiding construction of National Labor Relations Act that, *inter alia*, would have been contrary to a "well-established rule of international law"); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (stating that "some affirmative expression of congressional intent to abrogate the United States' international obligations is required" to construe a statute in a manner that would cause such abrogation). As the United States has previously acknowledged, the right to a status determination is required by international law:

> [The United States] support[s] the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated.

Martin D. Dupuis et al., *The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Pol'y 415, 425-26 (1987) (statement of Michael J. Matheson, Deputy Legal Adviser, United States Dep't of State); *see also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1389 (10th Cir. 1982) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.") (citing Universal Declaration of Human Rights, Arts. 3 and 9, U.N.Doc. A/801 (1948)).

There is, therefore, no valid basis for the D.C. Circuit's conclusion that the federal courts lack *jurisdiction* over petitioners' claims. To the contrary, in a world in which the United States seeks to persuade other nations to govern in accordance with the rule of law, the United States must honor its own commitment thereto by providing a judicial forum for testing the legality of its own executive detentions.

CONCLUSION

For the reasons set forth above, the Court should reverse the D.C. Circuit's decision and remand this case for further proceedings.

Respectfully submitted,

THOMAS F. CULLEN, JR.
(*Counsel of Record*)
CHRISTIAN G. VERGONIS
BETSY A. MILLER
FAHAD A. HABIB
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for Amici Curiae

January 2004

FILED
JAN 14 2004

(16) (15)

Nos. 03-334; 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF HUMAN RIGHTS INSTITUTE OF THE INTERNATIONAL BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

VAUGHAN LOWE
GUY S. GOODWIN-GILL
All Souls College
University of Oxford

PAMELA ROGERS CHEPIGA
Counsel of Record
ANDREW B. MATHESON
KAREN LEE
NATHAN REILLY
ALLEN & OVERY
1221 Avenue of the Americas
New York, New York 10020
(212) 610-6300

Counsel for Amicus Curiae

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Interest of the Amicus Curiae

The Human Rights Institute of the International Bar Association (the "Institute") is an international body headquartered in London, England, that helps promote, protect and enforce human rights under a just rule of law, and works to preserve the independence of the judiciary and legal profession worldwide.[1] Founded in 1995 under the Honorary Presidency of Nelson Mandela, the Institute now has more than 7,000 members worldwide.

The interest of the Institute is to urge the Court to respect international law in interpreting the jurisdiction of the U.S. courts. International law protects individuals from prolonged arbitrary detention at the hands of a state, regardless of where the detention occurs. This guarantee applies in times of war, as well as peace. Without access to judicial authority, this fundamental right is hollow. Under international law, the U.S. courts cannot be powerless to consider the lawfulness of Petitioners' detention.

This case challenges principles upon which the Institute was founded, particularly its commitment to the rule of law and international law as means of safeguarding fundamental human rights.[2] The Institute does not frequently intervene in litigation.

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[1] No counsel for a party authored this brief in whole or in part. This brief was prepared by the Human Rights Institute of the International Bar Association and its counsel: Allen & Overy, New York; Vaughan Lowe, Barrister, Essex Court Chambers and Chichele Professor of Public International Law and a Fellow of All Souls College, University of Oxford; Guy S. Goodwin-Gill, Barrister, Blackstone Chambers, Senior Research Fellow of All Souls College and formerly Professor of International Refugee Law at the University of Oxford. No person other than amicus and its counsel made any monetary contribution to the preparation or submission of this brief. Consents of the parties are being lodged herewith.

[2] The International Bar Association established a Task Force on International Terrorism co-chaired by Justice Richard Goldstone (Justice of the Constitutional Court of South Africa and former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda) and Ambassador Emilio Cardenas (President of the International Bar Association and Argentina's former Permanent

This case, however, is exceptional because of the basic nature of the right involved and the leadership role of the U.S. in world affairs. Friendly nations watch the U.S. with expectations based on widely accepted international law and shared legal traditions. Unfriendly nations look for an opportunity to accuse the U.S. of violating minimal standards of international law or to seize upon an American precedent to justify or obscure their own violations.

Statement of Facts

Petitioners are detained at the U.S. Naval Base at Guantanamo Bay by U.S. armed forces. For over two years, Petitioners have been imprisoned without recourse to court process or access to counsel. Petitioners are citizens of the United Kingdom, Australia and Kuwait. Petitioners are not "enemy aliens," since they are citizens of friendly states, nor are they "enemy combatants," since the government has offered no evidence or grounds for such classification. *See Odah v. United States*, 321 F.3d 1134, 1138 (D.C. Cir. 2003).

The U.S. maintains exclusive authority and control over Guantanamo Bay, which it has occupied under an indefinite lease from the Government of Cuba for over a century. While Cuba technically retains "ultimate sovereignty," the U.S. has "control and jurisdiction" until both states agree otherwise. *Agreement Between the U.S. and Cuba for the Lease of Lands for Coaling and Naval Stations*, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

The government has contended that, while the Petitioners may have some rights under international law, these as-yet undefined rights are to be determined by the military and

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Representative to the United Nations), and also composed of Professor Badria Al-Awadhi, Professor M. Cherif Bassiouni, Sten Heckscher, Baroness Helena Kennedy QC, Fali Nariman and Professor W. Michael Reisman. The Task Force released its report in October 2003. International Terrorism: Legal Challenges and Responses (Transnational Publishers, Inc., 2003). The report provides a comprehensive analysis of a variety of legal and human rights issues arising from the threat of international terrorism after September 11, 2001, including specifically those raised by Petitioners' case. The report was used extensively in preparation of this Brief.

executive branch, and the courts lack jurisdiction because Petitioners are being held outside the sovereign territory of the U.S.. *See Rasul v. Bush*, 215 F. Supp. 2d 55, 56 (D.D.C. 2002), *aff'd sub nom. Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

The District Court held that it lacked jurisdiction on the grounds that Guantanamo Bay is outside of the sovereignty of the U.S., since "[i]f an alien is outside the country's sovereign territory, then courts have generally concluded that the alien is not permitted access to the courts of the United States to enforce the Constitution." *See Rasul*, 215 F. Supp. 2d at 68. The District Court did not consider international law as part of federal law or as a guide for the interpretation of federal law and the Constitution.

In upholding the decision, the Court of Appeals focused on Petitioners' constitutional claims, referring to international law only briefly when rejecting claims under the Alien Tort Claims Act on the grounds that the "courts are not open" to Petitioners, regardless of whether they allege violations of treaties, federal law or the Constitution. *See Odah*, 321 F.3d at 1145.

The courts below placed heavy reliance on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The Institute submits that this reliance was based on a misunderstanding. *Eisentrager* actually compels a finding that U.S. courts have jurisdiction to review Petitioners' claims.

Summary of Argument

The jurisdiction of the U.S. courts should be interpreted so as to comply with international human rights law and international humanitarian law, which have developed and become binding on the U.S. since the Second World War. International human rights law guarantees a right against arbitrary detention, which entails a right to access judicial review, regardless of where and when the detention occurs. In times of armed conflict, international human rights law is complemented by international humanitarian law, which requires prompt classification and due process for all detained persons. Prolonged delay of classification without access to counsel or judicial review results in arbitrary detention, contrary to both humanitarian and human rights law.

To find that the U.S. courts lack jurisdiction to hear Petitioners because they are detained outside U.S. borders would violate international law, invite abuse by other states, and compromise the credibility of the U.S. as a proponent of human rights and the rule of law.

Argument

I. UNITED STATES LAW SHOULD COMPLY WITH INTERNATIONAL LAW

This Court has held that international law is part of U.S. law, to be ascertained and administered by the federal courts. Even where international law is not applied directly, it is used to interpret U.S. law. This Court followed this approach in many cases, including *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Existing U.S. law, including the flexible remedy of habeas corpus, must be interpreted so as to ensure the protection of the right against arbitrary detention as required by international law.

A. International Law and U.S. Law

The U.S. was founded on a deep respect for international law[3] as reflected in the text of the Constitution, which includes

[3] As stated by Alexander Hamilton:

> The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for injury ought ever to be accompanied by the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all of the causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquillity.

Alexander Hamilton, The Federalist No. 80, at 536 (J. Cooke ed., 1961); *see also Chisholm v. Georgia*, 2 U.S. 419, 474 (1793) (Chief Justice John Jay noting that "the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed").

treaties as part of the supreme law of the land along with the Constitution itself.[4] This Court has held that, while not explicitly mentioned in the Supremacy Clause, customary international law is nonetheless part of federal law. *See The Pacquette Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination"). The competence of federal courts to adjudicate on the effect of treaties and customary international law is established by the Constitution,[5] case law[6] and statute.[7] Indeed, this Court has applied international law to determine the legal status and rights of persons detained in the course of armed conflict. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 28 (1942) (determining the rights of "unlawful combatants" under international law, as well as the Constitution, and observing that "[f]rom the beginning of its history this Court recognized and applied the laws of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals").

While the Constitution provides that treaties are on equal footing with federal law, jurisprudence concerning international human rights treaties ratified by the U.S. after the Second World War is still evolving. One issue that has split lower courts is whether individuals suffering violations of "non-self-executing"

[4] U.S. Const. Art. VI, s.2 (establishing that the Constitution, federal statutes and treaties are all "the Supreme law of the land").

[5] U.S. Const. Art. III, s.2 (providing that cases arising under "the Laws of the United States.... and Treaties made...under their Authority" are within the federal judicial power).

[6] *See, e.g., Owing v. Norwood's Lesse*, 9 U.S. (5 Cranch) 344 (1809) ("The reason for inserting that clause in the constitution [Art. III, Section 2] was that all persons who have real claims under a treaty should have their causes decided by the national tribunals...Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is protected").

[7] 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

treaties are entitled to remedies from U.S. courts. The Institute argues below that the treaty obligation of the U.S. to respect the right against arbitrary detention requires enforcement in U.S. courts. Judicial review is an inherent and necessary aspect of the right against arbitrary detention under international law, which can be enforced through existing U.S. law, particularly the writ of habeas corpus. This right is entrenched in customary international law, as well as treaty obligations. For these reasons, U.S. courts have jurisdiction to hear Petitioners as a matter of the direct application of international law. *See, e.g., Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980) ("Our review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law" and "[t]herefore, even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remediable as a violation of international law"), *aff'd*, 654 F.2d 1382 (10th Cir. 1981).

However, the Court may also find that U.S. courts have jurisdiction to hear Petitioners by a different route. Rather than applying international law directly, the Court may follow the longstanding rule that U.S. law should be interpreted in accordance with international law wherever possible.

B. The Rule in Favor of Harmony with International Law

The principle that domestic law should be interpreted so as to avoid violations of international obligations wherever possible is well-established in the U.S. and other nations. *See, e.g., Restatement (Third) of Foreign Relations Law of the United States* §§ 114-15 (1987); Ian Brownlie, *Principles of Public International Law*, 40-48 (6th ed. 2003).[8]

[8] Even when deciding constitutional questions without international dimensions, this Court considers international law as a reflection of the "values that we share with a wider civilization." *Lawrence v. State*, 123 S. Ct. 2472, 2483 (2003); *see also Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002).

This Court has applied the principle of construction in favor of harmony with international law - often termed the Charming Betsy rule - in a wide variety of cases. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 29-30, 32-33 (1982) (looking to international law in interpreting statute that prohibited employment discrimination against U.S. citizens on military bases overseas unless permitted by treaty); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (in maritime tort case, looking to law of nations in determining statutory construction of Jones Act); *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (in admiralty case, noting that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963) (finding National Labor Relations Act did not apply to foreign vessels crewed by aliens because such laws "would raise considerable disturbance not only in the field of maritime law but in our international relations as well").

The rationale for interpreting domestic law in harmony with international law loses none of its force when a fundamental human right is involved. The U.S. aims to serve as a model of human rights protection in the world community and recognizes that compliance with international law is indispensable in the pursuit of this objective.[9] By conforming with minimal standards

[9] For example, the role of the U.S. as an example to the world was a significant motivation for the ratification of the International Covenant on Civil and Political Rights in 1992. The Senate Committee on ratification stated: "In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the impact of U.S. efforts in the human rights field." United States: Senate Committee On Foreign Relations Report On The International Covenant On Civil And Political Rights, 31 I.L.M. 645 (May, 1992), *reproduced from* U.S. Senate Executive Report 102-23 (102d Cong., 2d Sess.). These remarks echo those of President Carter, who stated in his message to the Senate recommending ratification:

under international law, the U.S. not only protects the rights of the persons directly involved, but also meets the expectations of other nations, fostering goodwill and compliance. The expectations of nations with whom the U.S. shares common legal and political traditions are particularly poignant.[10] Other countries, including those hostile to the U.S., should be denied the opportunity to cite U.S. violations as "excuses" for their own.

> While the United States is a leader in the realization and protection of human rights, it is one of the few large nations that has not become a party to the three United Nations human rights treaties. Our failure to become a party increasingly reflects upon our attainments, and prejudices the United States in the development of the international law of human rights.

Message From the President of the United States to the Senate of the United States: Transmitting The International Convention on the Elimination of All Forms of Racial Discrimination, Signed on Behalf of the United States on September 28, 1966 (Executive C, 95-2); The International Covenant on Economic, Social And Cultural Rights, Signed on Behalf of the United States on October 5, 1977 (Executive D, 95-2); The International Covenant on Civil and Political Rights, Signed on Behalf of the United States on October 5, 1977 (Executive E, 95-2); and The American Convention on Human Rights, Signed on Behalf of the United States on June 1, 1977 (Executive F, 95-2), February 23, 1978, 1966 U.S.T. LEXIS 521.

[10] In *The Queen on the Application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] All E.R. (D) 70 (C.A. 2002), the English Court of Appeal declined to compel the British Secretary of State to make representations to the U.S. concerning the detainees at Guantanamo Bay, but did so, in part based on its expectation that the U.S. would come into compliance with international law:

> What appears to us to be objectionable is that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. ... As is clear from our Judgment, we believe that the United States Courts have the same respect for human rights as our own.

Abbasi & Anor, [2002] All E.R. (D) 70 at ¶¶ 66, 107.

C. Applying *Johnson v. Eisentrager* Today

In holding that the U.S. courts lacked jurisdiction to hear Petitioners, the Court of Appeals misinterpreted *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The Court of Appeals failed to recognize that *Eisentrager* follows the rule in favor of harmony with international law. *See Odah v. United States*, 321 F.3d 1134, 1138-1145 (D.C. Cir. 2003). In *Eisentrager*, the Court considered international law and found that it had not been violated, where enemy aliens were charged, tried, convicted and punished overseas. The decision of the Court of Appeals in this case renders international law, which has evolved substantially since *Eisentrager,* irrelevant to the plight of detainees, who have not even been classified or charged, let alone tried, after two years.

In *Eisentrager*, this Court dismissed habeas corpus petitions by Germans who were convicted by a U.S. military tribunal in China shortly after the Second World War for violating the rules of war and were then repatriated to Germany to serve their sentences. *Eisentrager,* 339 U.S. at 765-66. Petitioners were "enemy aliens," since they were citizens of a state that was at war with the U.S. They argued, *inter alia*, that the military tribunal that convicted them lacked jurisdiction under international law. *Id.* at 785-90.

Although the Supreme Court dismissed the petitions, it did so only after Justice Jackson, writing for the majority, reviewed all relevant sources of international law at the time, including treaties and customary international law. *Id.* at 786-90. He observed that petitioners had received all of the due process required under existing international law, including disclosure of the full particulars of their alleged war crimes and a trial before a military tribunal, at which other defendants were acquitted. *Id.* at 766, 786-90. Justice Jackson concluded that there was nothing about the prosecution of petitioners that had infringed their rights under international law existing at the time. *Id.* at 789. Their detention was lawful under international law, which provided that prisoners of war could be detained until the end of war crimes proceedings and, if necessary, until the expiration of the punishment. *Id.*

Much has changed in international law in the half century since *Eisentrager* was decided, yet Justice Jackson's approach

remains correct. The obligations of the U.S. under international law should be rigorously examined and robustly enforced by the courts. Here, the analysis involves international human rights law, which emerged after the Second World War, as well as advances in international humanitarian law since the Second World War.

One of the premises of Justice Jackson's decision in *Eisentrager* was that if the U.S. granted habeas corpus to enemy combatants (already convicted by military tribunals), it could not expect any reciprocity, since apart from in England, the writ of habeas corpus was generally unknown at that time. *Id.* at 779. As discussed further below, this premise no longer pertains, due to major developments in international law since *Eisentrager*. While Justice Jackson's concern in 1950 was that the protections of U.S. law should not advance too far *beyond* those of other legal systems, this case presents a question of how far *behind* international norms U.S. law may be permitted to fall in the 21st century.

D. Habeas Corpus

U.S. law accords great respect to the writ of habeas corpus on account of its place in the Constitution and its flexibility as a remedy. U.S. Const., Art I, s 9, cl. 2 (providing that writ of habeas corpus subjiciendum "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"); *see, e.g., Hensley v. Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, California*, 411 U.S. 345, 349-50 (1973) (noting that "habeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes" and that "[t]he very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected") (internal citations and quotations omitted); *see also Frank v. Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) (noting that the writ "cuts through all forms and goes to the very tissue of the structure" and that "[i]t comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have more than an empty shell");

Fay v. Noia, 372 U.S. 391, 406 (1963) (adopting Justice Holmes' statement in *Frank v. Magnum* and holding that the Constitution invites, if not compels, a generous construction of the writ).

Nothing in the language of the habeas corpus statute precludes its application to persons detained outside the U.S.. The writ is available to, *inter alia*, persons in custody under the authority of the U.S. or in custody in violation of the laws or treaties of the U.S.. 28 U.S.C. § 2241 (2003). It makes no mention of territorial sovereignty.

In interpreting the scope of habeas corpus, this Court has taken guidance from English law, which would make the writ available to Petitioners, despite their detention outside of sovereign territory. *Jones v. Cunningham*, 371 U.S. 236, 238 (1963); *see also Amicus Curiae Brief on behalf of the Commonwealth Lawyers Association.*

This Court has also emphasized that, given the importance of habeas corpus as a flexible remedy, it should be available unless plainly exempted by law. *Ex Parte Yerger*, 75 U.S. 85, 102 (1868) ("This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States. . . . We are not at liberty to except from it any cases not plainly excepted by law. . . . These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction"). There is nothing that plainly exempts the application of habeas corpus in this case.

The availability of habeas corpus should also be considered in light of the limited (albeit critical) scope of its inquiry, which is to determine the lawfulness of the detention, not the guilt or innocence of the detainee. *In Re Yamashita*, 327 U.S. 1, 8 (1946). A ruling favorable to a petitioner does not necessitate release, since habeas corpus is broadly empowered to dispose of a matter as law and justice require. 28 U.S.C. § 2243; *see also Carafas v. Lavalle*, 391 U.S. 234, 239 (1968).

Given these considerations, it is not surprising that federal courts have relied on the habeas corpus statute to grant remedies where detention would otherwise be contrary to international law obligations assumed by the United States since the Second World War. *See, e.g., Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382,

1388 (10th Cir. 1981) (upholding grant of writ of habeas corpus, reasoning that an excluded alien in physical custody within the U.S. could not be punished without being accorded substantive and procedural due process, and noting that "[n]o principle of international law is more fundamental than the concept that human being should be free from arbitrary imprisonment"); *Beharry v. Reno*, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002) (in granting writ of habeas corpus, interpreting immigration statute to require hearing to determine whether alien convicted of felony could remain in the U.S. based on treaties, including the International Covenant on Political and Civil Rights, and customary international law, and observing that "[t]his nation's credibility would be weakened by non-compliance with treaty obligations or with international norms," which "[t]he United States seeks to impose . . . upon other nations," and further observing that as a "moral leader of the world, the United States has obligated itself not to disregard rights uniformly recognized by other nations"), *rev'd on other grounds,* 329 F.3d 51 (2d Cir. 2003); *Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (noting that unless statutes are interpreted as authorizing the detention of removable aliens only for reasonable periods of time, the clear international prohibition against prolonged and arbitrary detention would be violated).

II. INTERNATIONAL HUMAN RIGHTS LAW GIVES DETAINEES THE RIGHT TO JUDICIAL REVIEW

International human rights law primarily concerns duties of states towards individuals, rather than relations between states. The U.S. is bound by treaty and customary international law to respect the right of all individuals to be free from arbitrary detention, which entails an entitlement to challenge the lawfulness of their detention in court. The U.S. cannot escape its obligation to provide access to judicial review by detaining persons in locations, such as Guantanamo Bay, which may be said to be technically outside of its sovereign territory. The right against arbitrary detention applies in times of war, as well as peace.

A. International Human Rights Law Primarily Concerns Individuals' Rights, Not Relations Between States

International human rights law developed following the Second World War, largely as a result of U.S. support for the foundation of the United Nations and adoption of the Universal Declaration of Human Rights. At the core of this development was the notion that all human beings possess inherent dignity, enjoy fundamental rights and bear a duty to respect the fundamental rights of others. This focus on individual rights and obligations reflected a significant shift away from the traditional emphasis of international law on the relations between states, which had failed to prevent the atrocities of the war. The Nuremberg Trials signalled that all individuals would be held accountable for certain duties under international law, regardless of what may have been permitted or mandated by their domestic law. *See* Justice Jackson, Opening Statement for the Prosecution, Nuremberg Trials (Nov. 21, 1945), *reprinted in* II *Trial of the Major War Criminals before the International Military Tribunal: Second Day, Wednesday, 11/21/1945, Part 04*, at 98-102 (Nuremberg, IMT, 1947), *available at* http://www.law.umkc.edu/faculty/projects/FTrials/nuremberg/jackson.html ("This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace. An international law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare"). Similarly, human rights declarations and treaties established that all individuals are endowed with certain rights beyond whatever protections may be available under their particular domestic law. *See, e.g.*, Human Rights Committee, General Comment 24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6, ¶17 (1994) (stating that human rights treaties, including the International Covenant on Civil and Political Rights, which the U.S. has ratified, are "not a web of inter-State exchanges of mutual obligations," but instead "concern the endowment of individuals with rights" and therefore "the principle of inter-State reciprocity has no place").

The international law obligations of the U.S. concerning Petitioners cannot be regarded exclusively, or even primarily, as a

matter of relations between the U.S. and other nations. International human rights law rests on a different foundation: individuals possess rights which they may exercise themselves. The necessity of international law founded on individuals' rights comes into stark perspective here. The detainees at Guantanamo Bay are citizens of a variety of nations – allied, neutral and unfriendly - so the model of negotiations between warring nations does not apply. Over the past two years, diplomacy has produced neither swift nor consistent results, even for detainees who are citizens of nations allied with the U.S.. Since the essence of international human rights law is respect for the inherent dignity and rights of all individuals, its enforcement cannot be left to sluggish deliberations between the U.S. and a host of other nations, which are likely to produce, at best, tardy results that discriminate on the basis of the detainees' nationality. *See International Covenant on Civil and Political Rights,* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, 368, art. 2(1) (requiring all state parties to respect its enumerated rights, including the right against arbitrary detention, without distinction of any kind, including, *inter alia*, national origin).

B. U.S. Obligations Pursuant to Treaty and Customary International Law

1. International Covenant on Civil and Political Rights

The U.S. is bound to observe the right against arbitrary detention as matter of treaty obligation because it ratified the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, 368 in 1992.[11] The ICCPR provides, in pertinent part:

[11] The ICCPR has been ratified by 149 States. *See* I United Nations, *Multilateral Treaties Deposited with the Secretary General*, 164-65 (2003). The U.S. signed the ICCPR in 1977, and ratified it in 1992. *See Senate Resolution of Ratification of International Covenant on Civil and Political Rights*, 138 Cong. Rec. S 4781, *S4783, 102d Cong. (1992) (ratified Apr. 2, 1992). Congress added reservations. *See* 138 Cong. Rec. at *S4783.

> Article 9(1): Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> . . .
>
> Article 9(4): Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

According to the plain language of these Articles, the right against arbitrary detention entails a right to judicial review of the lawfulness of the detention. *See, e.g.*, *Vuolanne v. Finland*, No. 265/1987, Views of the Human Rights Committee, CCPR/C/35/D/265/1987 at ¶ 9.6, 2 May 1989 (finding that review of petitioner's claim before a superior military officer lacked the "judicial character" of a court hearing, thus depriving petitioner of his right of recourse to a "court").

The U.S. did not add any specific reservation or understanding relating to the right against arbitrary detention under Article 9. It did, however, declare that "articles 1 through 27 of the Covenant are not self-executing." *See* Declarations and Reservations by United States of America made upon ratification, accession or succession of the ICCPR, 138 Cong. Rec. at *S4783. The effect, if any, of such reservations on the enforceability of rights under human rights treaties is a matter of controversy that has not been resolved by this Court. However, there are powerful reasons for concluding that the reservation is irrelevant here.

First, in making the reservation, the U.S. did not intend to prevent individuals from using existing U.S. law to assert rights protected under the ICCPR.[12] In fact, the opposite was

[12] To thwart enforcement through domestic law would be contrary to the remedial provisions of the ICCPR, which provide, *inter alia*, that each state party undertakes to "ensure that any person whose rights and freedoms as herein recognized are violated shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity" and to "ensure that any person claiming such a remedy shall have his right thereto determined by

contemplated.[13] The longstanding, flexible remedy of habeas corpus is available to ensure protection of the ICCPR's right against arbitrary detention. Indeed the habeas corpus statute expressly provides that it is available where detention is contrary to treaties of the U.S.. *See* 28 U.S.C § 2241. No new legislation is necessary to enforce Petitioners' rights under the ICCPR, and therefore even if the reservation is valid, it is not triggered.

Second, even if the ICCPR's right against arbitrary detention is not directly enforceable as U.S. law, it may be used to interpret U.S. law, according to the Charming Betsy rule. This rule requiring the interpretation of domestic law in accordance with international law is particularly apposite where a statute, such as habeas corpus, is "couched in general language" and may be

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competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy." ICCPR, Part II, art. 2, s.3(a) and (b)).

[13] In its Initial Report to the Human Rights Committee, the United States stated:

> This declaration [that Articles 1 through 27 are not self-executing] did not limit the international obligations of the United States under the Covenant. Rather, it means that, as a matter of domestic law, the Covenant does not, by itself, create private rights directly enforceable in U.S. courts. As indicated throughout this report, however, the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. For this reason it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law. In some cases, it was considered necessary to take a substantive reservation to specific provisions of the Covenant, or to clarify the interpretation given to a provision through the adoption of an understanding."

Initial Report of the U.S. to the Human Rights Committee, CCPR/C/81/Add.4, August 24, 1994; *see also* Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645 (1992), *reproduced from* U.S. Senate Executive Report 102-23 (102d Cong., 2d Sess).

"applied in an extraterritorial way." *Weinberger v. Rossi*, 456 U.S. 25, 33 (1982).

2. Customary International Law

The right against arbitrary detention is also protected by customary international law, as reflected in a broad range of international instruments, decisions, commentaries and State practice. The Universal Declaration of Human Rights, which is recognized as an authoritative statement of customary international law, contains the obligation to provide detainees with an opportunity to challenge their detention in court. Universal Declaration of Human Rights, Dec. 10, 1948, arts. 9-10, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810. This obligation is included in every other major international human rights convention that contains a general enumeration of rights.[14] There is now a wide international practice in support of a principle akin to habeas corpus under international law.[15]

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[14] *See, e.g.*, American Declaration of the Rights and Duties of Man, May 2, 1948, arts. XXV, XXVI, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) (expressing the obligations of members of the Organization of American States, including the U.S.); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5, 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 9, 999 U.N.T.S. 171, 6 I.L.M. 368; American Convention on Human Rights, Nov. 22, 1969, art. 7(5), 1144 U.N.T.S.123, 9 I.L.M. 673; African Charter on Human and People's Rights, June 27, 1981, arts. 6-7, 21 I.L.M. 58; *see also* African Commission Decisions in Communication Nos. 13/94, 139/94, 154/96, 161/97 (Saro-Wiwa v. Nigeria) (holding that Article 6 prohibited arbitrary detention), 64/92 (Aleke Banda v. Malawi) (same).

[15] For example, the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly by Resolution 43/173 G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988), contains a requirement for judicial control (Principle 4), a right to legal assistance (Principle 17), a right to consult counsel (Principle 18) and a right to challenge the lawfulness of detention (Principle 32). The Body of

The consistency and weight of international practice is such that the distinguished authors of the Third Restatement assert that, as a matter of customary international law, a state violates international law if, as a matter of policy, it practices, encourages, or condones "prolonged arbitrary detention." *Restatement (Third) of Foreign Relations Law of the United States* § 702, n.6 (1987).

Unlike in 1950 when Justice Jackson decided *Eisentrager*, the duty to respect the right against arbitrary detention is now clearly binding on the U.S. as a matter of both treaty and customary international law. Moreover, the U.S. cannot excuse itself from its obligations by detaining persons outside of its borders.

C. U.S. Obligations Arise Through Authority and Control

Under international law, the duty to respect the right against arbitrary detention applies whenever a state exercises authority and control over a person, regardless of where the detention occurs. International tribunals consistently hold that the responsibility of a state to secure basic human rights established in international law for the benefit of individual persons does not hinge on the presence of such persons within the sovereign territory of the state, or their nationality, but rather on whether such persons are subject to the authority and control of the state. One of the fundamental purposes of the recognition of the right against arbitrary detention was to prevent abuse by states shifting the site of detention outside their borders, so as to avoid domestic laws. Consequently, Cuba's "ultimate" or technical sovereignty over Guantanamo Bay is irrelevant under international law.

The reach of the prohibition against arbitrary detention under international law has been addressed in the context of the ICCPR and the American Declaration of the Rights and Duties of Man, both of which apply and bind the U.S. *See* ICCPR, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its

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Principles contains no provision for suspension of the guarantees in times of crisis.

jurisdiction the rights recognised in the present Covenant."); American Declaration of the Rights and Duties of Man, May 2, 1948, arts. XXV, XXVI, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc .6 rev.1 at 17 (1992).

The United Nations Human Rights Committee, which is responsible for monitoring compliance with the ICCPR, determined that a state party may be held accountable for "violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it." *López Burgos v. Uruguay,* No.52/1979, Views of the Human Rights Committee, CCPR/C/13/D/52/1979 at ¶12.3, 29 July 1981 (finding petition concerning the kidnapping and detention of petitioner's husband by Uruguayan agents in Argentina admissible for review); *see also Casariego v. Uruguay*, No.56/1979, Views of the HRC, CCPR/C/13/D/56/1979 at ¶¶10.1-10.3, 29 July 1981 (where petitioner was arrested and detained incommunicado by Uruguayan agents in Brazil, petition against Uruguay admissible for review). The Committee further held that it would be "unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." *Burgos*, at ¶12.3. These decisions hold that, while jurisdiction is usually linked with territory, a state does not escape the duty to respect fundamental individual rights under the ICCPR when it exercises authority and control over individuals outside of its territory.

Likewise, the Inter-American Commission reached the same result in interpreting the American Declaration of the Rights and Duties of Man, by which the U.S. has conceded it is bound. *See Coard v. United States*, Case 10.951, Inter-Am. C.H.R. Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. at 1283 (1999) at §§ 37, 39, 41 and 43 (addressing the detention of petitioners during U.S. military occupation of Grenada, noting that the U.S. conceded that it was bound by the Declaration, and holding that "[g]iven that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction," that

jurisdiction "may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad," and that "[i]n principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control").

European courts have held that a state is liable for acts of its agents even on another sovereign's territory. While these decisions are not binding on the U.S., they reflect the uniformity of international law regarding the scope of a state's obligations. The European Commission and the European Court of Human Rights have interpreted "jurisdiction" under the European Convention on Human Rights as extending protection to individuals, regardless of their nationality, in places where they are subject to the actual control of agents of states, even if those places are outside the territory of the state. *See Cyprus v. Turkey,* App. No. 8007/77, 13 DR 85 (1977) (holding that a basic tenet of the Convention provides that states are "bound to secure the rights of all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad"); *see also Loizidou v. Turkey*, App. No. 14318/89, 23 Eur. H.R. Rep. 513 (1996); *Bankovic v. Belgium and 16 Other Contracting States*, App. No. 52207/99, 12 December 2001, 11 B.H.R.C. 435; *Ocalan v. Turkey*, App. No. 46221/99, 37 Eur. H.R. Rep. 10 (2003).

This approach to the extraterritorial reach of the duties of states is further reflected in the principles of international law concerning state responsibility, which define when a state becomes liable for the breach of its international obligations, irrespective of the nature or source of those obligations. These affirm that a state is responsible for the conduct, *inter alia*, of persons or entities exercising elements of governmental authority, or acting on the instructions of, or under the direction or control of, that state. The criterion is the link between the person said to have undertaken the conduct and the state in question. The nationality of the persons affected by the conduct, or their

presence within the sovereign territory of the state in question, is immaterial. *See* United Nations International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 83, U.N. GAOR, 56th Sess., Supp. No. 10 and Corrigendum, U.N. Doc. A/56/83 (2001).

D. Obligations Under International Human Rights Law Continue During Armed Conflict

The Human Rights Committee has identified the obligation to respect the right against arbitrary detention under the ICCPR as one, like the right to life and the right to be free from torture, that is so fundamental that it is non-derogable, even during a time of public emergency which threatens the life of the nation. *See* Human Rights Committee, General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶11 (2001) (referring to the right of derogation under Article 4 of the ICCPR and holding that "State parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, or by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence"). Accordingly, this right continues to apply in circumstances of military occupation and military rule - even when other rights guaranteed by the ICCPR might, consistent with the Covenant, be temporarily derogated.

International human rights tribunals have held that, even where national security is involved, the suspension of habeas corpus is impermissible, as access to judicial review is integral to the protection of the enumerated non-derogable rights such as the right not to be tortured. *See* Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of 30 January 1987, para. 35 (interpreting the derogation provisions of the American Convention on Human Rights and stating "habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel,

inhumane, or degrading punishment or treatment"); *see also* Human Rights Committee General Comment No. 29, para.16 (interpreting the ICCPR and stating that, "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant"). Absent the enforcement of the most basic due process guarantees, the universally recognized rights of detainees to life and to be free of torture become, effectively, rights without remedies and render impotent the protections of the ICCPR.

While the right against arbitrary detention is non-derogable, and always entails a right of judicial review, the concept of "arbitrariness" allows for some adaptation to particular contexts. *See, e.g.*, *Aksoy v. Turkey*, 23 Eur. Ct. H. R. 553 (1996) (holding that while "the investigation of terrorist offences undoubtedly presents the authorities with special problems," as each measure has to be strictly necessary under the ICCPR and the European Convention on Human Rights, "it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention"). Where there are conditions of armed conflict threatening national security, the test to determine whether detentions are "arbitrary" is informed by international humanitarian law.

III. INTERNATIONAL HUMANITARIAN LAW REQUIRES CLASSIFICATION AND DUE PROCESS

International humanitarian law applies during armed conflict. This law complements international human rights law by prescribing how the right against arbitrary detention is preserved during armed conflict. While the U.S. is entitled to be vigilant in protecting itself against terrorists, there is no legal concept of "war on terror" that releases the U.S from its obligation to respect the right against arbitrary detention. Rather, international humanitarian law establishes how to preserve a just balance between due process and national security interests with respect to detentions arising from all manner of armed conflicts. As it stands, the detainees in Guantanamo Bay find themselves in

precisely the sort of "legal black hole" that international humanitarian law aims to seal off. *See The Queen on the Application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] All E.R. (D) 70 (C.A.) 2002 (describing Guantanamo Bay detainee as "arbitrarily detained in a 'legal black hole,'" which the court viewed as contrary to "fundamental principles recognised by both jurisdictions [the U.S. and the United Kingdom] and by international law").

A. Obligations of the U.S.

The U.S., along with 190 other states, has ratified both the 1949 Geneva Convention Relating to the Treatment of Prisoners of War ("P.O.W. Convention"), Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, and the 1949 Geneva Convention Relating to the Protection of Civilian Persons in Time of War ("Civilian Convention"), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, which apply to "all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them." P.O.W. Convention, art. 2; Civilian Convention, art. 2.

The Geneva Conventions are regarded as pillars of international humanitarian law and binding as a matter of customary international law, as well as treaty law.[16] *Legality of*

[16] While the Geneva Conventions are widely recognized as the central documents of modern international humanitarian law, the beginnings of the field pre-dates them by almost a century. On April 24, 1863, President Lincoln promulgated General Order 100, widely known as the Lieber Code, codifying the laws of war for U.S. forces. Francis Lieber, Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War (24 April 1863), *reprinted in* D. Schindler and J. Toman, *The Laws of Armed Conflicts*, at 3-23, (the "Lieber Code"), (Martinus Nihjoff Publisher, 1988). This code had significant influence on the international debate regarding the further codification of the laws of war and is viewed as a starting point for subsequent international conventions such as the 1899 and 1907 Hague Conventions on land warfare. *See, e.g.*, Manooker Mofidi and Amy Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59, 62 (Spring 2003).

the Threat of Use of Nuclear Weapons, (Advisory Opinion), 1996 I.C.J. 226, 257 (Jun 24) (holding the terms of the Conventions binding as a matter of customary international law, since the rights they protect are so "fundamental" as to be "intransgressible"). Two additional protocols relating to the Conventions are also regarded as part of customary international law. *See* Protocol Additional to Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, ("First Additional Protocol"), 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977); *see also* Protocol II Additional to Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Second Additional Protocol"), 1977 U.S.T. LEXIS 465 (June 10, 1977). Although the U.S. has not ratified the additional protocols, it has recognized the importance of the documents as part of the body of customary international law.

The principles of the Conventions and protocols have been incorporated in U.S. military regulations[17] and followed by the U.S. in previous conflicts.[18] The treatment of Petitioners in this

[17] In its *Operational Law Handbook*, the Judge Advocate General's School, U.S. Army, states "that the US views [among others, Articles 45 and 75 of the First Additional Protocol] as customary international law." Judge Advocate General's School, U.S. Army, *Operational Law Handbook*, JA 422 at 18-2 (1997). This statement is qualified in the 2002 edition of *Operational Law Handbook,* in which it is now said that the U.S. views Article 45 of the First Additional Protocol as "customary international law or acceptable practice though not legally binding." Judge Advocate General's School, U.S. Army, *Operational Law Handbook*, Ch. 2 (2002). However, there is no evidence to suggest that customary international law has changed in this way since 1997, nor is any explanation offered for this attempt to deny the validity of the position adopted by the U.S. in 1997.

[18] During the Vietnam War, the U.S. Military Assistance Command issued comprehensive criteria for the classification and disposition of detainees, providing for the systematic classification of detainees into "prisoner of war" and "non-prisoner of war" categories. *See* Military Assistance Command Vietnam, *Directive Number 381-46*, Annx. A, (27 December 1967). Extensive provision was made for due process in the determination of eligibility for prisoner of war status in cases of "non-prisoners of war and doubtful cases who are captured by or are in the

case is a marked departure from the procedures mandated by international humanitarian law and followed by the U.S. in the past. *See Amicus Curiae Brief of Retired Military Officers* (discussing past U.S. military practice).

B. Rights of Status and Due Process under the Conventions

Among the objectives of the Conventions, two are of overriding importance in this case. First, the Conventions require that all detainees be promptly classified, in order that they may receive rights and privileges appropriate for their status. Second, humanitarian law ensures fundamental due process for all detainees, regardless of their status, so that no person is detained arbitrarily or indefinitely.

The Conventions provide for the protection of persons detained in circumstances of armed conflict, either as prisoners of war entitled to the benefits of the P.O.W. Convention or as civilian detainees protected under the Civilian Convention. *See* P.O.W. Convention, art. 5; Civilian Convention, arts. 71-76, 132, 133*; see also* 4 International Committee of the Red Cross, *Commentary on the Geneva Conventions of 12 August 1949* (1958) ("Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Geneva Convention, a civilian covered by the Fourth Geneva Convention…There is no intermediate status; nobody in enemy hands can be outside of the law").

Any detainee claiming the status of prisoner of war or appearing to be so entitled is presumed to be a prisoner of war, and retains that status until such time as his status has been determined by a competent tribunal. *See* P.O.W. Convention, art. 5 (stating "should any doubt arise as to whether persons, having committed any belligerent act and having fallen into the hands of the enemy,

custody of U.S. forces." *See* Military Assistance Command Vietnam, *Directive Number 20-5* (15 March 1968). In particular, the military laid down the principle that, "[t]he Detainee shall have the right to be present with his counsel at all open sessions of the tribunal," required time with counsel, free access by counsel and interviews in private, opportunity to confer with essential witnesses and rights of cross-examination. *Id.*

belong to the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal"). Among the rights accorded to prisoners of war are protection against prosecution for taking part in the conflict (unless they committed a violation of the Conventions) and entitlement to release upon the cessation of hostilities. *See* P.O.W. Convention, arts. 87 and 118.

Even where the presumption of prisoner of war status is displaced, the Conventions afford due process protection to all detainees, ensuring that they are not held without justification and that any prosecution brought against them accords with fundamental justice. Combatants who are not members of any armed forces or volunteer corps belonging to a party to a conflict have been described as "unlawful combatants," although no such status is recognized in the Geneva Conventions. If they are not members of the armed forces, they fall within the scope of the Civilian Convention. Accordingly, while unlawful combatants (unlike prisoners of war) may be prosecuted for taking part in the conflict and for any crimes committed in that regard, they are entitled to the judicial guarantees set out within the Civilian Convention should they be prosecuted for their actions. *See* Civilian Convention, art. 72. Article 3, which is common to all of the Conventions, provides that all detainees shall be protected against "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." P.O.W. Convention, art. 3; Civilian Convention, art. 3. These protections provide a guarantee that no detainee is, because of the vagaries of legal classification, left without a minimum of legal recourse.

Persons not clearly falling into the express categories of the Conventions, including "unlawful combatants," are further protected under Article 75 of the First Additional Protocol, which is widely considered to have formalized the customary international law protections set forth in Article 3 of all four Geneva Conventions. The rights identified in Article 75 are designed for the protection of individuals who fall outside the categories of lawful combatants or civilians. *See* Knut Dörmann,

The legal situation of "unlawful/unprivileged combatants," 849 International Review of the Red Cross 70 (March 2003). Article 75 states that individuals, even those not properly characterized as prisoners of war or civilians must, *inter alia*, not be sentenced or have a penalty imposed on them with respect to "a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedures." First Additional Protocol, art. 75. Article 75 also provides that detainees are entitled to the rights of defense, including assistance by a qualified advocate or counsel "who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence." First Additional Protocol, art. 75(4)(a).

C. U.S. Failure to Classify Petitioners

At present, the Petitioners' legal classification as prisoners of war, civilians or some other distinct status has simply never been determined by any duly constituted tribunal. The U.S. has not acknowledged or determined Petitioners' status as "prisoners of war." This is contrary to the presumption of "prisoner of war" status, which may only be displaced through due process in a competent tribunal. *See* P.O.W. Convention, art. 5; First Additional Protocol, art. 45(1)-(2). Here, the government has refused to accord this presumed status to Petitioners, yet it has simultaneously declined to initiate any formal proceedings to demonstrate that this refusal is merited under the Geneva Conventions.

Instead, the government has claimed that the detainees are "unlawful combatants" or "enemy combatants," though it has introduced no evidence or grounds for such characterization, and the courts below declined to accept the government's unsupported assertions. *See Odah v. United States*, 321 F.3d 1134, 1138 (D.C. Cir. 2003) ("Although the government asked the district court to take judicial notice that the detainees are "enemy combatant," the court declined and assumed the truth of their denials"). As submitted above, while the category of "unlawful combatants" is not expressly used in the Conventions, the attachment of this label

to the detainees does not place them outside of the scope of the bedrock rights ensured by the Conventions to all detainees, regardless of category.

D. Prolonged or Indefinite Detention

By refusing to recognize Petitioners' status in accordance with the Conventions and additional protocols, the government seeks to put them outside the scope of any effective legal framework that can ensure they not be detained any longer than permitted or justified under international law. Under Article 132 of the P.O.W. Convention, prisoners of war must be released upon the cessation of hostilities. P.O.W. Convention, art. 132. The Civilian Convention contains an analogous provision ensuring the release of civilians detained in circumstances of armed conflict (on narrow permissible grounds, such as "definite suspicion" of hostile activity) when the reasons which necessitated their internment no longer exist. *See* Civilian Convention, art. 132. The U.S. is not currently engaged in any armed conflict with Afghanistan or the national state of any of the Petitioners.

Similarly, the protections in Article 3 of all of the Conventions against the sentencing of detainees without the judgment of a regularly constituted court clearly contemplate that the indefinite detention of unlawful combatants (or non-P.O.W. and non-civilian individuals) is impermissible.

In ensuring that detention is not arbitrary, lawful limits on the length of detention are critical. Particularly in the instant situation where, by the President's admission, the "war on terrorism" may last years, if not decades, the government must follow established international law practices limiting the length of detainees' confinement. By failing to make a determination of the Petitioners' status for more than two years, the government has not only contravened the requirements of international law and its own long-standing precedents, but it has also institutionalized the arbitrary nature of the Petitioners' confinement by ensuring that there is no legally recognized standard by which to measure whether the Petitioners are being accorded the due process rights to which they are entitled. The prospect of indefinite imprisonment, without trial or explanation, is precisely the type of

arbitrary detention prohibited under international law. *See Restatement (Third) of the Foreign Relations Law of the United States*, § 702, note h (noting that "[d]etention is arbitrary if it is not pursuant to law" or "if it is incompatible with the principles of justice or with the dignity of the human person," that even "[a] single, brief, arbitrary detention by an official of a state party to one of the principle international agreements might violate that agreement" and that "arbitrary detention violates customary international law if it is prolonged and practiced as a state policy") (internal citations omitted); International Committee of the Red Cross, *Guantanamo Bay: Overview of the ICRC's work for internees* (November 6, 2003) *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/5QRC5V?OpenDocument ("The ICRC's main concern today is that the US authorities have placed the internees in Guantanamo beyond the law. This means that, after more than eighteen months of captivity, the internees still have no idea about their fate, and no means of recourse through any legal mechanism").

E. Humanitarian Law Applies Outside U.S. Borders

A state cannot escape the obligations of international humanitarian law by detaining persons outside its borders. This appears to be conceded by the government. *See Rasul v. Bush*, 215 F. Supp. 2d 55, 56 (D.D.C. 2002), *aff'd sub nom. Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). The protections of the Conventions apply to persons "in enemy hands or who have fallen into the power of the enemy." *See* International Committee of the Red Cross, *Commentary to First Additional Protocol*, para. 2910. The test for the application of humanitarian law is whether the territory falls under the control of the state. *See The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, Decision, 2 October 1995, para. 70.

Conclusion

The prohibition against arbitrary detention is a fundamental principle of international law that applies whenever a state exercises authority and control, and continues in times of war. The present detention of Petitioners is inconsistent with this basic human right. The jurisdiction of the U.S. courts to hear Petitioners should be interpreted to conform to obligations under international law, preserve the role of the U.S. as a guardian of human rights, and meet the expectations of the international community.

Respectfully submitted,

Pamela Rogers Chepiga
Counsel of Record
Andrew B. Matheson
Karen Lee
Nathan Reilly
ALLEN & OVERY
1221 Avenue of the Americas
New York, New York 10020
(212) 610-6300

VAUGHAN LOWE
GUY S. GOODWIN-GILL
All Souls College
University of Oxford

Attorneys for Amicus Curiae

January 13, 2004

(13) (13)

Nos. 03-334 and 03-343

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SHAFIQ RASUL, et al.,

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v.

GEORGE W. BUSH, President of the United States, et al.,

Respondents.

and

FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* BIPARTISAN COALITION OF NATIONAL AND INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS IN SUPPORT OF PETITIONERS

MICHAEL H. POSNER
DEBORAH PEARLSTEIN
FIONA DOHERTY
LAWYERS COMMITTEE FOR HUMAN RIGHTS
333 Seventh Avenue, 13th Floor
New York, NY 10001-5004
(212) 845-5200

JONATHAN M. FREIMAN
Counsel of Record
CHRISTIAN TURNER
WIGGIN AND DANA LLP
One Century Tower
265 Church Street
New Haven, CT 06510
(203) 498-4400

Attorneys for Amici Curiae Bipartisan Coalition of National and International Non-Governmental Organizations

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF *AMICI*

Amici are a bipartisan group of organizations with widely varying agendas and values that come together in this brief to support a single proposition: there must be review of the legality of Executive detention.[1]

Three are human rights organizations. Since 1978, the **Lawyers Committee for Human Rights** (LCHR) has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. LCHR believes this case presents an issue at the heart of its work to ensure that domestic legal systems incorporate international human rights protections. **Amnesty International** (AI) is a non-governmental organization working to ensure that every person enjoys all human rights. It is independent of any political ideology or economic interest. It was founded in 1961 and has a worldwide membership. AI bases its work on internationally-recognized human rights standards. It believes that there can be no land without law and no executive detention without judicial remedy. In line with its international focus, AI joins this brief on matters of international law. **Human Rights Watch** is a nonprofit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others to end abusive practices.

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[1] Letters of consent to the filing of this brief accompany this brief. No counsel for a party authored this brief in whole or in part and no person, other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Nine are legal organizations. The **American Civil Liberties Union** (ACLU) is a nationwide, nonpartisan, nonprofit organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and reflected, as well, in numerous international treaties and norms. Since its founding in 1920, the ACLU has frequently appeared before this Court in cases involving an alleged conflict between national security and individual liberty, and has repeatedly defended the role of habeas corpus as a time-tested guarantor of basic human rights. The **Anti-Defamation League** (ADL) was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. To that end, ADL speaks as both an advocate for civil rights and liberties and as an aggressive supporter of law enforcement and the government's important efforts to fight international terrorism. ADL believes that judicial review is fundamental to the success of these efforts. The **Association of the Bar of the City of New York**, founded in 1870, is a 22,000-member organization devoted to preserving legal institutions, promoting reform of the law and improving the administration of justice. While most of its members practice in the New York City area, the Association has members in nearly every state and over 50 nations. The Association has submitted *amicus curiae* briefs and educated the bar and the public regarding legal issues in the context of the "war on terrorism." The **Law Society of England and Wales** is the professional body representing more than 110,000 solicitors in England and Wales. It is concerned to see the independence of the legal profession, the rule of law and human rights upheld throughout the world. We recognise the need for governments to reassess their security needs and to tackle the potential threat posed by international terrorism. However, it is essential that the correct balance is struck between the legitimate aim of protecting the country and upholding the principles of fairness and justice. The **National Association of Criminal Defense Lawyers** (NACDL) has more than 10,000 members nationwide and

28,000 affiliate members in 50 states. Founded in 1958 to advance and disseminate knowledge in the area of criminal practice and to encourage integrity, independence, and expertise among criminal-defense counsel, NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the line between civilian and military law. The **National Association of Social Workers, Legal Defense Fund** (NASW LDF) is a subsidiary of the National Association of Social Workers (NASW), the largest association of professional social workers in the world. It has been in existence for thirty years to provide support for legal cases and issues of concern to NASW members and the social work profession. NASW supports the adoption of human rights as a foundation principle upon which all of social work theory and applied knowledge rests, including the right not to be subjected to dehumanizing punishment. **People For the American Way Foundation** (People For) is a non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 600,000 members and supporters nationwide. One of People For's primary missions is to educate the public on the vital importance of our tradition of liberty and freedom, and to defend that tradition, including due process rights, through litigation and other means. The **Rutherford Institute** (Institute) is a nonprofit civil liberties organization founded in 1982 by its President, John W. Whitehead. The Institute educates and litigates on behalf of constitutional and civil liberties, and attorneys affiliated with the Institute have appeared as counsel or submitted *amicus curiae* briefs in many significant civil liberties and human rights cases. Institute attorneys currently handle several hundred civil rights cases nationally at all levels of federal and state courts. **Trial Lawyers for Public Justice** (TLPJ) is a national public interest law firm dedicated to using trial lawyers' skills and approaches to create a more just society.

Through precedent-setting litigation, TLPJ prosecutes cases throughout the country designed to enhance consumer and victims' rights, environmental protection, civil rights and liberties, our civil justice system, and the protection of the poor and powerless. TLPJ is committed to ensuring that the United States continues to provide – and stand throughout the world as a beacon for – access to justice.

Four represent the millions of Americans whose religious faith or culture helps define their values. The **American Jewish Committee** (AJC), a national organization with over 125,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of all Americans are equally secure. AJC believes that striking the appropriate balance between enhancing our national security and defending our liberties allows petitioners access to courts to challenge their detention. **Islamic Circle of North America** (ICNA Relief) provides case management, advocacy, and direct relief to the needy in accordance with the tenets of Islam. The agency's original charge was to concentrate on local problems around the U.S., while not neglecting disaster relief overseas. The ICNA Relief 911 program provides emergency financial and legal support for hundreds of Muslim, Arab and South Asian detainees and their families, as well as others affected directly by the September 11th terror attacks. The **National Council of the Churches of Christ in the USA** (NCC), founded in 1950, is the leading force for ecumenical cooperation in the United States. The NCC's 36 Protestant, Anglican and Orthodox member denominations include more than 50 million persons in 140,000 local congregations in communities across the nation. The NCC, as a religious organization, is interested from a moral standpoint in the right to due process, which is being denied the detainees in Guantanamo. The **Union for Reform Judaism** (URJ) is the congregational arm of the nation's largest Jewish denomination, encompassing 1.5 million people across North America. In this age of terrorism, as we strive to strike the appropriate balance

between cherished, constitutionally protected freedoms and national security, we turn to Jewish law for guidance, which mandates the just treatment of strangers among us. Therefore, URJ opposes indefinite detention and administrative rulings that deny individuals due process.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Petitioners in this case claim that they never "engaged in hostilities against America." *Odah v. United States*, 321 F.3d 1134, 1140 (D.C. Cir. 2003). They say they are innocents caught up in the fog of war, and they have now been imprisoned for more than a year and a half. *Id.* at 1136-37, 1140. Yet according to the Court of Appeals, no court has jurisdiction to hear their claims. The Court of Appeals did not base its decision on the principle that courts must shy from the battlefield, since the Petitioners were moved far from the fields of war long ago. According to the Court of Appeals, the principle is simpler: the Executive can do what it wishes to aliens abroad – even innocent aliens – because no law protects them and no court may hear their pleas.

That is a stunning proposition, and *Amici* emphatically reject it. As this Court taught in *Ex Parte Quirin*, "the duty . . . rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty." 317 U.S. 1, 19, 25 (1942) (holding that "neither the [Presidential] Proclamation nor the fact that [petitioners] are enemy aliens forecloses consideration by the courts of petitioners' contentions").

The Court of Appeals decision suffers from three major flaws. *First*, it wrongly concludes that "[i]f the Constitution does not entitle the detainees to due process . . . they cannot invoke the jurisdiction of our courts to test the . . . legality of restraints on their liberty." *Id.* at 1141. The writ of habeas corpus is not so limited. It provides a means to challenge Executive detention on the basis of any law of the United States – not just the Constitution. *See* 28 U.S.C. § 2241(c) (extending writ to any person "in custody in violation of the Constitution or laws or treaties of the

United States."). The Geneva Convention Relative to the Treatment of Prisoners of War (GPW), 6 U.S.T. 3316, 75 U.N.T.S. 135, ratified by the United States, is one such law, and Petitioners have non-frivolously claimed that their detention violates the terms of that convention.

Second, the Constitution *does* entitle the Guantanamo detainees to due process. The flexible standard of due process enunciated in *Mathews v. Eldridge*, 424 U. S. 319 (1976), provides a context-sensitive means to balance the real concerns of national security with the equally real possibility of an erroneous deprivation of freedom. *Mathews* makes clear that courts can protect national security without blinding themselves to the claims of those aliens held abroad by U.S. officials. Furthermore, any number of this Court's cases, such as *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), make clear that even those extraterritorial aliens with no property or presence in this country have *some* due process rights.[2] If the Due Process Clause protects an alien corporation with no presence in this country from having to defend itself in a U.S. court, it would be perverse to think that the clause does not protect an alien individual from indefinite detention without any court review at all.

Were the Due Process Clause inapplicable to U.S. actions in Guantanamo Bay, then the Constitution would allow the summary execution or torture of prisoners detained there. Indeed, the government has conceded this in open court. *See Gherebi v. Bush*, 2003 WL 22971053, at *13 (9th Cir. Dec. 18, 2003) ("[A]t oral argument, the government advised us that its position would be the same

[2] This brief addresses only whether Guantanamo detainees who have received *no* process may maintain a habeas petition because that, in fact, is the status of all the current detainees at Guantanamo, including Petitioners. The brief does not address the separate and at this point purely hypothetical question of the availability and scope of habeas review for Guantanamo detainees who receive the review process that these petitioners have been denied.

even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantanamo, the U.S. government has never before asserted such a grave and startling proposition."). Of course, there are forces external to the Constitution that might moderate such atrocities. But the very idea that the Constitution would have nothing to say about such matters is inimical to the principle of fair treatment at the heart of the Due Process Clause.

Third and finally, the Court of Appeals' construction of both the habeas statute and the Due Process Clause flouts the "values we share with a wider civilization." *Lawrence v. Texas*, 124 S. Ct. 2472, 2483 (2003); *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002). The very decision that the Court of Appeals most frequently cites – *Johnson v. Eisentrager*, 339 U.S. 763 (1950) – was based in good part on comparative and international law. In the more than half-century since, that law has changed dramatically. Democratic allies around the world that have confronted ongoing terrorist threats, as well as the international treaties that the United States has ratified, provide for judicial review of the legality of Executive detention.

This shared practice of reviewing detentions, mirrored in our own habeas statute, is the surest guarantee of the protection of innocents. As Respondent Secretary of Defense Rumsfeld has acknowledged, soldiers in wartime sometimes make mistaken captures.[3] History more than supports the Secretary's acknowledgement. When U.S. soldiers captured presumed belligerents in the conflicts in Vietnam and Iraq, competent tribunals were quickly

[3] *See, e.g.*, U.S. Dept. of Defense (DOD), News Transcript (Jan. 27, 2002) ("Sometimes when you capture a big, large group there will be someone who just happened to be in there that didn't belong in there.") (remarks of Secretary of Defense Donald H. Rumsfeld). All DOD releases and briefings cited in this brief can be found on the DOD website at www.defenselink.mil.

convened to determine whether those caught were truly combatants – and if so, whether they were entitled to prisoner-of-war status. Many were released. *See generally* U.S. MILITARY JUDGE ADVOCATE GENERAL OPERATIONAL LAW HANDBOOK (M. Lacey and B. Bill eds., 2000).

Convening those tribunals was both legally proper and wise. As Justice Jackson noted three years after *Eisentrager*, review of governmental action "is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice." *Shaughnessy v. Mezei*, 345 U.S. 206, 224-25 (1953) (Jackson, J., dissenting). This nation's courts must have jurisdiction to protect our system of justice from those "lasting stains."

STATEMENT OF FACTS

The United States now holds approximately 660 people at its military base at Guantanamo Bay, Cuba.[4] Charles Savage, *U.S. Releases 20 Detainees, Transfers 20 More to Cuba*, BOSTON GLOBE, Nov. 25, 2003. Of those brought to the base, about 84 have been released. *Id.* Two have been given military lawyers.[5] The United States has permitted access to the rest only to the International Committee of the Red Cross – the organization charged

[4] The United States controls Guantanamo Bay under a perpetual lease with Cuba that grants the United States "complete jurisdiction and control over and within said areas." Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, art. III, T.S. No. 418 (14a); *see also* Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, T.S. No. 866 (confirming and extending lease terms). The lease can be terminated only if the United States consents. The Cuban Foreign Ministry has repeatedly acknowledged that it has "no jurisdiction" over the base. *See, e.g., Havana Mute on U.S. Plan for Detainees*, PERISCOPE DAILY DEFENSE NEWS, Jan. 2, 2002.

[5] DOD News Release, DOD Assigns Legal Counsel for Guantanamo Detainee (Dec. 3, 2003); DOD News Release, Defense Counsel Assigned to Salim Ahmed Hamdan (Dec. 18, 2003).

with monitoring compliance with the Geneva Conventions – and some foreign diplomatic officials. Bob Drogin, *No Leaders of Al Qaeda Found at Guantanamo*, L.A. TIMES, Aug. 18, 2002.

The U.S. Department of Defense has asserted that the Guantanamo prisoners, nearly all of whose identities have not been officially disclosed, are "battlefield" detainees who were engaged in combat when arrested.[6] But in addition to Petitioners' claims of non-combatancy, it is clear that some detainees were apprehended far from battlefields. For instance, Guantanamo holds six Bosnians and Algerians who were arrested by Bosnian police in Bosnia and then handed over to U.S. troops at the request of the United States. *See US Embassy in Bosnia Says 6 Al Qaeda Suspects Sent to Cuba*, AGENCE FRANCE PRESSE, Jan. 24, 2002. They were quickly transported to Guantanamo, despite a Bosnian court order that four of the men remain in Bosnia for further proceedings. Daniel Williams, *Hand-Over of Terrorism Suspects to U.S. Angers Many in Bosnia*, WASH. POST, Jan. 31, 2002.[7] "The Americans wanted the Algerians and got them," said Vlado Adamovic, a judge on the Bosnian Federation Supreme Court. "As a citizen, all I can say is it was an extra-legal procedure." *Id.*

The Guantanamo detainees have become the subject of widespread international concern over the past two years. In November 2003, the International Committee of the Red Cross broke its traditional rule of silence, publicly expressing its concern about the "unresolved" status of the detainees:

[6] In March 2002, for example, Department of Defense General Counsel William Haynes described the Guantanamo detainees as "enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies." DOD News Briefing on Military Commissions, DefenseLINK (Mar. 21, 2002).

[7] *See also* Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post September 11 United States*, at 84-85 (2003).

> The ICRC's main concern today is that the US authorities have placed the internees in Guantanamo beyond the law. This means that, after more than eighteen months of captivity, the internees still have no idea about their fate, and no means of recourse through any legal mechanism . . . .[¶] This has prompted the ICRC to ask the US authorities to institute a due legal process in accordance with the judicial guarantees stipulated by international humanitarian law. This process should formalize and clarify the fate of each and every individual in Guantanamo and put an end to the seemingly open-ended system of internment that currently exists.

International Committee of the Red Cross, *Guantanamo Bay: Overview of the ICRC's Work for Internees*, Nov. 6, 2003.

Serious criticism has also come from some of the United States' staunchest allies, including nations engaged in their own longstanding battles against terrorist organizations. Several days after the ICRC announcement, Judge Steyn, one of Britain's most senior judges, denounced the Guantanamo camp as a "monstrous failure of justice," emphasizing that "[t]he purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors." Lord of Appeal Johan Steyn, Guantanamo Bay: The Legal Black Hole, Address at the Twenty-Seventh F.A. Mann Lecture, Nov. 25, 2003. That same month, Spanish Foreign Minister Ana Palacio called the indefinite detentions at Guantanamo a "major error" and urged this Court to "open a path" to end the "legal limbo." *Long Term Detention of Guantanamo Suspects Called a 'Major Error,'* TORONTO STAR, Nov. 12, 2003.

The Executive appears to intend to use Guantanamo as a long-term offshore detention center free from judicial

review.[8] Two years after the first detainees arrived, the center has begun to show signs of permanence. On April 28, 2002, the detainees were transferred from the makeshift open-aired cells of Camp X-Ray to the permanent, rigid steel mesh cells of Camp Delta. Elisabeth Frater, *Guantanamo Gets a Makeover*, NAT'L J., May 4, 2002. The United States is now building a fifth camp inside Camp Delta. This camp, a hard-sided concrete building, will increase detainee capacity from 1,000 to 1,100 by mid-2004. Charles Savage, *Camp Expansion Indication of U.S. Stance on Military's Detainees*, MIAMI HERALD, Aug. 26, 2003.

ARGUMENT

I. THE FEDERAL COURTS HAVE JURISDICTION TO HEAR PETITIONERS' HABEAS CLAIMS

The federal habeas statute under which Petitioners bring their claims, 28 U.S.C. § 2241(c), states that the writ of habeas corpus extends to any person "in custody in violation of the Constitution or laws or treaties of the United States." There are at least two laws of the United States that Petitioners claim their current custody violates: the Due Process Clause of the Fifth Amendment, and the GPW, a treaty ratified by the United States. Both claims are non-frivolous and fit squarely within the terms of the habeas statute. The Court of Appeals, relying on *Eisentrager*, held that extraterritorial aliens never have any constitutional rights. The court therefore concluded

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[8] The Department of Defense is preparing for military commission trials, but no detainees have yet been charged. Vanessa Blum, *Military Justice*, LEGAL TIMES, Dec. 29, 2003. No more than several dozen detainees are expected to be tried before military commissions. Neil Lewis, *The Military Tribunals: Rules on Tribunal Require Unanimity on Death Penalty*, N.Y. TIMES, Dec. 28, 2001. The Executive has claimed that even if a detainee is acquitted by a military tribunal, he may still be held indefinitely at Guantanamo as an "enemy combatant." Laura Sullivan, *Bush Lists 6 for Terror Trials*, CHICAGO TRIB., July 4, 2003.

that there could be no jurisdiction to hear the detainees' claims, which were presumed to rely only on the Constitution. That conclusion contains within it two important errors, each of which requires reversal.

First, it ignored the fact that the habeas statute provides for jurisdiction over claims that custody violates the "*treaties* of the United States." 28 U.S.C. § 2241(c) (emphasis added). Because Petitioners claim that their custody violates the GPW – indisputably a "treat[y] of the United States" – federal courts have jurisdiction to consider the merits of at least those claims.[9]

Second, *Eisentrager* does not resolve the very different issues presented by this litigation. In *Eisentrager*, the parties contested the availability of a *second* assessment of the legality of detention: *post-conviction* habeas relief following a criminal conviction by a military tribunal that, via conviction, had determined the legality of the petitioners' detention. Here, the parties argue over whether due process requires *any process at all* by which detainees can contest the legality of their detention.[10] Petitioners' claim –

[9] This brief addresses the legal issues related to individuals, like Petitioners, assertedly seized on or near battlefields. It does not address the potentially different legal situation of those Guantanamo detainees who were seized in non-battlefield settings, such as Bosnia, whose claims are not now before this Court and as to whom applicable law may differ.

[10] Moreover, the opening sentences of the *Eisentrager* opinion carefully circumscribed the legal issue presented by describing the "ultimate question" as whether the civil courts of the United States possessed the jurisdictional authority to entertain writs brought on behalf of enemy aliens who were captured in China, tried and found guilty in that country by a U.S. military commission for violating the laws of war, and then held in custody at an American military prison in Germany. 339 U.S. at 765-66. The Court resolved this jurisdictional question by concluding that the continued imprisonment of the enemy aliens in *Eisentrager* did not violate their due process rights, and therefore, the U.S. courts were without jurisdiction to hear their habeas claims. The Court's ruling, however, was closely tied to the facts, which are emphasized throughout the opinion. Reflecting that approach, the

(Continued on following page)

that the Due Process Clause entitles them to at least some process to challenge the legality of their detention – was not decided in *Eisentrager*.[11] This claim cannot possibly be characterized as frivolous and falls well within the habeas statute's provision of jurisdiction over any person "in custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2241(c).[12]

A. Habeas Jurisdiction Is Proper Because Petitioners Claim That Their Ongoing Executive Detention Violates The Geneva Conventions

The federal habeas corpus statute expressly provides Petitioners with a cause of action over which the federal

Court articulated the limits of its Due Process analysis in the following terms: "We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States." 339 U.S. at 785. No wider lesson can or should be drawn from *Eisentrager*.

[11] Additionally, the detainees in *Eisentrager* were being held on territory that our government held as an occupying power but over which it exerted no claim of exclusive dominion. By contrast, Petitioners in this case are being held in territory over which the United States possesses exclusive authority and control under a leasehold arrangement that can continue in perpetuity in the sole discretion of the United States government. *See generally* Brief of Former U.S. Government Officials.

[12] These errors may perhaps best be explained by the circuit court's indifference to the plain text of the statute. As the Court of Appeals acknowledged, it viewed the "particular jurisdictional language" of the habeas statute as irrelevant in determining jurisdiction, choosing to conclude instead that it could apply a standardless rule in which "everything turn[s] on the circumstances of those seeking relief, on the authority under which they [are] held, and on the consequences of opening the courts to them." *Odah*, 321 F.3d at 1145. The panel cited no authority for its remarkable conclusion that the very *language* of the habeas statute is irrelevant when determining whether that statute provides jurisdiction.

district court has jurisdiction. The statute gives federal courts the power to grant the writ of habeas corpus to a person held in "custody in violation of the . . . *treaties* of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added). The Court of Appeals ignored the plain language of the statute, erroneously conflating the writ and the Constitution. *Compare INS v. St. Cyr*, 533 U.S. 289, 302-03 (2001) (rejecting "suggestion that habeas relief in cases involving Executive detention was only available for constitutional error"), *with Odah*, 321 F.3d at 1141 ("If the Constitution does not entitle the detainees to due process . . . they cannot invoke the jurisdiction of our courts to test the . . . legality of restraints on their liberty."). As the U.S. Military has itself long recognized, the GPW provides a rule by which this habeas petition must be judged. *See* Dep't of the Army, LAW OF WAR WORKSHOP DESKBOOK ch. 5, § IV(E)(3), at 85 (Brian J. Bill ed., 2000) [hereinafter LAW OF WAR WORKSHOP DESKBOOK] (stating that prisoners of war "have standing to file a Habeas Corpus action . . . to seek enforcement of their GPW rights"). Because Petitioners non-frivolously claim that their detention violates the Convention, the District Court had jurisdiction under 28 U.S.C. § 2241(c)(3) to hear their claims.[13]

There can be little doubt that Petitioners' claims are at least non-frivolous. The GPW requires all contracting parties to treat those taking part in the armed conflict as POWs "from the time they fall into the power of the enemy

[13] Whether or not Article 5 of the GPW is "self-executing" and provides a cause of action in U.S. courts, it clearly provides a rule of decision for an action brought under the habeas statute, 28 U.S.C. § 2241. *See generally* Brief of Former Prisoners Of War and Experts On The Law Of War, filed in support of certiorari in *Hamdi v. Rumsfeld*. As that brief explains, *Eisentrager*'s conclusion about the solely diplomatic enforceability of the 1929 Geneva Conventions, 1929 Convention Relative to the Treatment of Prisoners of War, art. 82(1), July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343, has no bearing on the proper use as a rule of decision of the 1949 GPW, which has different text and different drafting and ratifying histories.

and until their final release and repatriation." Convention, art. 5, 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 140 [hereinafter Article 5]. There is one – and only one – exception to that requirement:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [deserving of POW status], such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal.*

Id. at 3324 (emphasis added).[14]

The meaning of this clear language has been undisputed by the United States since its ratification of the Convention in 1955. Every department of the U.S. military has incorporated the language of the Convention directly into its binding regulations regarding the treatment of wartime detainees:

> In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present

[14] U.S. officials have asserted that no Article 5 tribunals are needed because there is not "any doubt" that those detained at Guantanamo are ineligible for POW status. As the Statement of Facts, *supra*, and Part III, *infra*, make clear, this assertion has been widely rejected. That is because there are strong grounds for concluding that some detainees are either entitled to POW status under the Third Geneva Convention (e.g., members of regular Afghan armed forces) or are civilians entitled to protected person status under article 4 of the Fourth Geneva Convention, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. *See* ICRC *Commentary*, Fourth Geneva Convention, art. 4 ("nobody in enemy hands can be outside the law"). In any event, the U.S. Executive's view has not been tested through any review process available to detainees.

> Convention *until such time as their status has been determined by a competent tribunal.*

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-6(a) (1997) (emphasis added) [hereinafter AR 190-8].[15]

Indeed, these sources explicitly provide detainees the opportunity to assert not only POW status, but also *innocence*. The multi-force regulation, for instance, authorizes a competent tribunal to determine whether a detainee is in fact an "innocent civilian," AR 190-8, §1-6(e)(10), i.e., to assess the sort of claim that Petitioners make here.

These military regulations accord with the practices faithfully adhered to by the U.S. military in every major conflict since World War II. During the Korean War, the United States military treated captured Chinese soldiers as POWs under the Convention, even though neither the U.S. nor China were then parties to the Geneva Conventions.[16] During the Vietnam War, the United States military reiterated that "Article 5 [of the GPW] requires that the protections of the Convention be extended to a person who has committed a belligerent act and whose entitlement to Prisoner of War . . . status is in doubt *until such time as his status has been determined by a competent*

[15] This regulation was jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force, and Marine Corps, Washington, D.C., October 1, 1997. The same authoritative source directs that a "competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status . . . who asserts that he or she is entitled to treatment as a prisoner of war . . . " AR 190-8, §1-6(b). Furthermore, U.S. Navy regulations advise naval officers that "individuals captured as spies or as illegal combatants *have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated.*" Dep't of the Navy, NWP 1-14M: *The Commander's Handbook on the Law of Naval Operations* 11-3 (1995) (emphasis added).

[16] Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces* (2002), *available at* http://www.hrw.org/backgrounder/usa/pow-bck.htm.

tribunal." U.S. Military Assistance Command for Vietnam, Directive No. 20-5 § 2(a) (Mar. 15, 1968), *reprinted in Contemporary Practice of the U.S. Relating to Int'l Law*, 62 Am. J. Int'l L. 754, 768 (1968) (emphasis added). The Vietnam directive explicitly identifies the Convention as "applicable law," *id.* at 771, and proclaims that "[n]o person may be deprived of his status as a prisoner of war without having had an opportunity to present his case with the assistance of a qualified advocate or counsel." *Id.*

The United States continued this tradition of compliance during the 1991 Persian Gulf War. The U.S. Army convened 1,196 tribunals to determine the status of detained enemy combatants during Operation Desert Storm. Dep't of Defense, CONDUCT OF PERSIAN GULF WAR: FINAL REPORT TO CONGRESS app. L at 578 (Apr. 1992) [hereinafter CONDUCT OF PERSIAN GULF WAR]; LAW OF WAR WORKSHOP DESKBOOK 79. As a result, 310 individuals were granted POW status. Many other detainees who came before the tribunals "were determined to be displaced *civilians* and were treated as refugees." CONDUCT OF THE PERSIAN GULF WAR at 578 (emphasis added).

The Convention's explicit requirements, supported by unwavering military practice, demand that Petitioners be considered POWs unless and until a competent tribunal determines otherwise. No one disputes that the U.S. government has denied Petitioners GPW protections without convening a competent tribunal to determine their status, as required by Article 5. In "violation of . . . the treaties of the United States," 28 U.S.C. § 2241, and a half century of consistent military practice, Petitioners have been denied POW protections and denied a hearing by a competent tribunal under Article 5 of the GPW.

B. Habeas Jurisdiction Is Proper Because Petitioners Claim That Their Ongoing Executive Detention Violates Due Process

The Court of Appeals assumed that Petitioners were non-combatant citizens of friendly nations accidentally caught up in hostilities, *Odah*, 321 F.3d at 1140 ("the cases

before us were decided on the pleadings, each of which denied that the detainees had engaged in hostilities against America"), but nevertheless held that they were "not entitle[d]" to Due Process protections, *id.* at 1141 ("If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty."). It thus concluded that "the writ may [not] be made available to aliens abroad when basic constitutional protections are not." *Id.* Those conclusions (1) mischaracterize the state of the law; (2) fail to recognize the considerable flexibility within the Due Process Clause; and (3) run afoul of this Court's recent Due Process jurisprudence.

1. It is simply not settled whether, or in what manner, the Fifth Amendment applies to non-citizens abroad. *See Miller v. Albright*, 523 U.S. 420, 451 (1998) (noting that "it is unclear whether an alien may assert constitutional objections when he or she is outside the territory of the United States") (O'Connor, J., concurring). That alone should give pause. Where it is unclear whether an underlying right exists, it is particularly inappropriate to find a lack of *jurisdiction* to determine whether the right exists on the basis of a conclusion about the underlying right. Yet that is exactly what the Court of Appeals did here.

The importance of independent review of Executive action is underscored – not undermined – by *Eisentrager* itself, the case on which the Executive now relies so heavily. In *Eisentrager*, the parties contested the availability of a *second* level of review: *post-conviction* habeas relief. But the petitioners in *Eisentrager* had already been convicted: i.e., the legality of their detention had already been assessed by a tribunal. While *Eisentrager* limited the availability of the second level of review, the crucial point is that the petitioners in that case had been afforded a process which led to the release of six of those accused by the government. The *Eisentrager* Court did not take the more extreme step of saying that aliens detained by the United States beyond our shores could be denied *all* process – as the Executive now claims.

That important distinction was not undermined by the decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), on which the Court of Appeals also relied. *Verdugo* concerned the criminal trial – not detention without review – of an alien drug kingpin seeking to exclude evidence obtained abroad. The Court concluded that the Fourth Amendment's warrant requirement does not apply to a non-resident alien who challenges a search conducted outside the United States. While *Verdugo* spoke more broadly in a paragraph of dicta, that language played no part in the Court's holding. *See Odah*, 321 F.3d at 1141 (recognizing paragraph's status as dicta).

Concurring in *Verdugo* – and casting the fifth vote – Justice Kennedy avoided rigid line-drawing and found that courts should use a contextual approach in determining whether constitutional rights apply abroad under any given set of facts. Acknowledging that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic," he concluded that one must ask "what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations." 494 U.S. at 277 (Kennedy, J., concurring). He then observed that the application of the Fourth Amendment's warrant requirement to a search conducted in Mexico would be both "impracticable and anomalous" given the procedural difficulties and oddities that would result from applying to Mexican magistrates and working with Mexican officials, particularly given the varying "and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad." *Id.* at 278.

No such difficulties exist here. As shown below, nations agree that there must be some review of the legality of prolonged detention. *See* part III, *infra*. As important, the provision of some review of the legality of the Guantanamo detentions, unlike the proposed Mexican search warrant process at issue in *Verdugo*, is completely within the control of the United States. There would be no need to work with Cuban officials on such review, and no need to engage in the sort of cultural translation against which Justice Kennedy warned in *Verdugo*.

2. The flexible approach to constitutional extraterritoriality that Justice Kennedy outlined in *Verdugo* comports well with the modern conception of the Due Process Clause, embodied in *Mathews v. Eldridge,* 424 U.S. 319 (1976). The Due Process Clause "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334. Rather, the procedures appropriate to test the legality of a deprivation vary with the circumstances: "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.*

Because the Due Process Clause is "flexible," due process rights and judicial review of those rights would not lead to the dire consequences that the Court of Appeals feared. The analysis required by *Mathews* – decided a quarter century after *Eisentrager* – amply protects critical government interests:

> [D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

A court applying the *Mathews* test could therefore account for national security interests – not undermine them by mechanical application of a rigid rule. For instance, it could consider the national interest in not "divert[ing a field commander's] efforts and attention from the military offensive abroad to the legal defensive at home" and not "hamper[ing] the war effort and bring[ing] aid and comfort to the enemy," *Odah*, 321 F.3d at 1139 (quoting *Eisentrager*, 339 U.S. at 779), when determining the process due. But it could also consider the interests that potential innocents have in challenging, in some

forum, the legality of their detention. In short, it could attempt to balance the weighty interests on both sides of the equation.

Such balancing might or might not lead to the procedures detailed in the GPW – a document signed and ratified with the understanding that its provisions for the treatment of enemy combatants would be binding in wartime.[17] But a court asked to find the balance mandated by the Due Process Clause may not simply *assume* that no process is due – and deny jurisdiction on the basis of that assumption.[18]

3. The courts have long recognized that the Due Process assurance of fundamental fairness provides at least *some* protection to extraterritorial aliens who find themselves under the power of the United States. That much is clear from the "minimum contacts" analysis required by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113-16 (1987). Under the *Asahi* line of cases, it is precisely those foreign national defendants that have no property *or presence* in the United States – those *without* "minimum contacts" – that are protected by the

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[17] Naturally, U.S. obligations under the GPW could require a GPW Article 5 proceeding whether or not the Due Process Clause independently requires such a proceeding. *See* part I.A., *supra*.

[18] *Amici* do not address *what* process is due at Guantanamo, but they agree that the Due Process Clause requires the nation's courts to ensure *some* process. Whatever process may be appropriate on the battlefield (if any), the Guantanamo detainees have been transported by the Executive branch to a location far from the zone of active hostilities. There, where seizure has morphed into detention and a battlefield has given way to a detention center, *some* process is due. Indeed, as more time passes without a review of the legality of the Guantanamo detentions, the process due may become more substantial. As non-battlefield military detention becomes prolonged, the liberty interest increases – it is worse to lose a year and a half of liberty than a week – and the governmental interest may decline as intelligence becomes stale.

Due Process Clause from defending themselves in the United States. *Contra Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003) (asserting incorrectly that foreign nationals "without property or presence in" the U.S. have "no constitutional rights, under the due process clause or otherwise.").

In *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), for instance, this Court noted that "the Due Process Clause provides an important measure of protection for out-of-state defendants, *especially foreigners*." *Id.* at 462 (emphasis added). This "measure of protection" exists not by grace but by right: the "personal jurisdiction requirement [of the Due Process Clause] recognizes and protects an individual liberty interest." *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982). For that reason, foreign defendants with insufficient contacts in this nation cannot be compelled to defend themselves in our courts – a compulsion that would "offend traditional notions of fair play and substantial justice." *Asahi*, 480 U.S. at 113 (internal quotation marks omitted). As this Court forthrightly explained a year after *Asahi*, "there has been *no question* in this country of excepting foreign nationals from the protection of our Due Process Clause. Under that Clause, foreign nationals are assured of . . . service that provides notice . . . [and] an opportunity to present their objections." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) (internal quotation marks omitted; emphasis added).

If the Due Process Clause protects nonresident aliens from being unjustly haled into U.S. courts to defend themselves, it certainly protects nonresident aliens from being haled by the U.S. into indefinite detention without even *a chance* to defend themselves. As this Court has noted, "[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that the [Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

II. ISRAELI, BRITISH, AND INTERNATIONAL LAW ALL REQUIRE REVIEW OF THE LEGALITY OF EXECUTIVE DETENTION

Petitioners' indefinite detention without review undermines the "values we share with a wider civilization, *Lawrence v. Texas*, 124 S. Ct. 2472, 2483 (2003); *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002), and contravenes the "decent Respect to the Opinions of Mankind," THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776), that this nation's founders hoped to earn. This deviance from world practice and opinion is particularly troubling because *Eisentrager* itself was based in good part on international law and practice. *See Eisentrager*, 339 U.S. at 785 (noting "[t]he practice of every modern government"), 786 (citing treaty law), 787-88 (citing the law-of-war Hague Regulations and several secondary sources on international law). Just as Justice Jackson's decision for the Court in *Eisentrager* evaluated the petition in light of the international law of its day, this Court should look to the international law of today.

A. Other Democratic Nations Require Review

The courts of this nation's closest democratic allies – especially those nations with long-term experience combating terrorism, such as the United Kingdom and Israel – have made clear that governments cannot sidestep judicial review and bypass due process protections by holding detainees outside their sovereign territory.

Israeli courts have the power to hear the petitions of non-citizens detained by the Executive outside Israel's sovereign territory. The Supreme Court of Israel began to review the actions of Israeli authorities in the West Bank

and Gaza shortly after Israeli Defense Forces (IDF) captured the territories in the 1967 Six Day War.[19]

The Israeli Supreme Court has explicitly held that the actions of Israeli officials in the territories fall within its jurisdiction. *Ja'amait Ascan v. IDF Commander in Judea and Samaria*, (1982) 37 (4) P.D. 785, 809 (upholding jurisdiction where military commander in occupied territories was fulfilling public duty). The Israeli Supreme Court has never questioned the standing of non-citizen residents in the non-sovereign territories to file suit before it. Kretzmer, *supra*, at 25; *see, e.g.*, *Christian Society for the Holy Places v. Minister of Defense*, (1971) 26 (1) P.D. 574; *Khelou v. Government of Israel*, (1972) 27 (2) P.D. 169, 176-77.

Challenges to Executive detention by the Israeli Defense Forces in the West Bank and Gaza are thus heard regularly in Israeli courts. *See Marab v. IDF Commander in the West Bank*, (2003) 57 (2) P.D. 349, ¶ 32 (Israeli Supreme Court) (finding "judicial review of detention proceedings essential for the protection of individual liberty" and striking down Executive military orders establishing, in West Bank and Gaza, a "special framework regarding detention" that allowed the military to detain for 12-18 days without judicial review). As lawyers in the Military Advocate-General's Unit of the IDF have explained:

> [J]udicial review . . . has not only provided a form of redress for the grievances of Area inhabitants and a safeguard of their rights; it has also provided a powerful symbol and reminder to the officials of the Military Government and Civil Administration of the supremacy of law and legal institutions and of the omnipresence of the Rule of Law wherever Israeli officials' writ may run.

U. Amit-Kohn et al., "Israel, the 'Intifada,' and the Rule of Law," (Tel Aviv: Israel Ministry of Defense Publications, 1993) 17-18 (cited in Kretzmer, *supra*, at 2). In particular, challenges to Executive detention can be brought to the Israeli Supreme Court once available review procedures before the Israeli military courts have been exhausted. *Abu Baker v. Judge of Schehem Military Court*, (1988) 40 (3) P.D. 649.

Like Israeli law, English law gives courts jurisdiction over habeas petitions arising in British "protectorates" outside British *sovereign* territory. In *Ex parte Mwenya*, for example, the English Court of Appeal found that an English court could issue a writ of habeas corpus to an individual detained in Northern Rhodesia – a territory over which the United Kingdom exercised "power and jurisdiction" but not sovereignty. [1960] 1 Q.B. 241 (Eng. C.A.). In so finding, the court rejected the government's argument that English courts lacked jurisdiction to issue writs to territories outside British sovereign control. Lord Evershed explained that jurisdiction

> depend[s] on the extent to which the Crown (or the Crown and Parliament) has in fact assumed and exercises jurisdiction on and over the affairs (and particularly the internal affairs) of the country to the exclusion of any other, or effective, jurisdiction.

Id. at 297. Lord Romer emphasized that "[t]he contrary view would result in a subject having no redress at all if he were detained, however unlawfully, in a protectorate which was in substance a colony but which had no effective courts of its own." *Id.* at 305. Lord Romer made clear that he believed the writ should run to prevent "hardship such as this" in territory in which the Crown "has assumed such a degree of power and control that the protected State is to all intents and purposes a British possession and in which the writ, if issued, would certainly be effective in its results." *Id.*

[19] *See* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 1 (2002). The West Bank and Gaza are not part of Israeli sovereign territory. *See Salkhaht v. Government of Israel*, (1991) 47 P.D. IV 837 (West Bank is not sovereign but rather "held by Israel by way of military occupation or belligerent occupation").

It was against this legal backdrop that the English Court of Appeal decided the case of Ferroz Ali Abassi, a British citizen detained at Guantanamo Bay since January 2002 who sought to compel the British Foreign Office to make representations to the U.S. government on his behalf. *Abassi v. Sec'y of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598. While emphasizing its caution in approaching any allegation that a foreign state is in breach of its international obligations, the *Abassi* court concluded that "in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr. Abassi is at present arbitrarily detained in a 'legal black hole.'" *Id.* at para. 64. Expressing the hope that "the anxiety we have expressed" might be drawn to the attention of the U.S. appellate courts, *id.* at para. 107, Lord Phillips emphasized:

> What appears to us to be objectionable is that Mr. Abassi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.

Id. at para. 66, 107(iii).[20]

[20] Like the law of the United Kingdom and Israel, European law ensures that all detainees be allowed to challenge the legality of their detention. The (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHRFF), Nov. 4, 1950, 213 U.N.T.S. 221, which every member of the European Union has ratified or acceded to, gives a detainee the right to "take proceedings by which the lawfulness of his detention shall be decided. . . . " *Id.* art. 5. The European Court of Human Rights, the supreme adjudicatory body under the European Convention, has clearly held that European governments must provide such review to every individual subject to their jurisdiction and control, even when the individual is outside a State's sovereign territory. Thus, in *Loizidou v. Turkey*, a case concerning the Turkish military presence on Northern Cyprus, the European Court held that "the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national

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B. International Law Requires Review

International law requires that Petitioners be given the chance to challenge the legality of their detentions. The International Covenant on Civil and Political Rights (ICCPR) clearly provides that "[*a*]*nyone* who is deprived of his liberty by arrest or detention shall be entitled to proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, art. 9(4), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, 368 (emphasis added).[21] This principle is nothing new. It has had a central place in the Anglo-American legal tradition for nearly eight hundred years, since the Magna Carta, and is protected by a wide range of international legal instruments, decisions, commentaries, and State practice.[22]

territory." App. No. 15318/89, 23 Eur. H.R. Rep. 513 (1996). Similarly, in *Ocalan v. Turkey*, a case concerning a capture in Kenya, the European Court held that Turkey's responsibilities under the European Convention were triggered when Ocalan came within "effective Turkish authority [in Kenya] and was therefore brought within the 'jurisdiction' of that State." App. No. 46221/99, 37 Eur. H.R. Rep. 10, para. 93 (2003).

[21] *See also* U.N. H.R. Comm., General Comment No. 29, ¶16, CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (ICCPR supreme adjudicatory body concludes that "right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention" is non-derogable).

[22] *E.g.*, Universal Declaration of Human Rights, Dec. 10, 1948, arts. 9-10, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810; American Declaration of the Rights and Duties of Man ("American Declaration"), May 2, 1948, arts. 15-16, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); ECHRFF, art. 5; ICCPR, art. 9; American Convention on Human Rights, Nov. 22, 1969, art. 7(5), 1144 U.N.T.S. 123, 9 I.L.M. 673; United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32, adopted by G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988); *see also Restatement (Third) of Foreign Relations Law of*

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There is no exception from this principle for *military* detentions. To the contrary, international humanitarian law – sometimes known as the law of war – clearly provides for review of the legality of military detention. As set forth in detail above, Article 5 of the GPW expressly provides for a hearing when there is doubt as to whether a captured belligerent is entitled to POW status, and may result in the release of persons found to be non-belligerents. *See also* Inter-American Comm'n on H.R. (IACHR), Detainees at Guantanamo Bay, Cuba, Request for Precautionary Measures, 41 I.L.M. 532, 534 (March 12, 2002) (requesting that U.S. ensure that detainees' legal status is determined by competent tribunal in accord with GPW and emphasizing that "no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable rights").

Nor is there any exception for offshore putative "legal black hole[s]." *Abassi, supra*, at para. 64. As the Universal Declaration of Human Rights makes clear, "[e]veryone has the right to be recognized *everywhere* as a person before the law." Art. 6 (emphasis added). Moreover, the Universal Declaration explicitly forbids a government's denial of rights premised on "the political, jurisdictional or international status of the country or territory to which a person belongs." *Id.* at art. 2. The ICCPR similarly requires that "[e]ach State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory *and subject to its jurisdiction* the rights recognized in the present Covenant." ICCPR, art. 2(1); *accord López Burgos v. Uruguay*, App. No. 52/1979, CCPR/C/13/D/52/1979 at para. 12.3, 29 July 1981 (ICCPR supreme adjudicatory body holding "it would be unconscionable . . . to permit a State party to perpetrate violations . . . on the territory of

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the United States §702, n.6 (1987) (concluding that "prolonged arbitrary detention," i.e., detention without review, violates international law).

another State, which violations it could not perpetrate on its own territory").

The American Declaration, ratified by the United States, likewise states that "[e]very person has the right to be recognized *everywhere* as a person having rights and obligations, and to enjoy the basic civil rights." American Declaration, art. 17 (emphasis added); *see also Coard v. United States,* Ann. Rep't of the IACHR 1999, Report No. 109/99 (Sept. 29, 1999), 1283 at para. 37 ("Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. . . . [T]he inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."); *Ferrer-Mazorra v. United States*, Report 51/01, Case 9903 (April 4, 2001), para 179-180 ("OAS Member States are obliged to guarantee the rights under the Declaration to all individuals falling within their authority and control."). For that reason, the IACHR has noted, in the very circumstances now before this Court, that "no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights." IACHR, Decision on Request for Precautionary Measures, 41 I.L.M. at 533. Any other principle would lead to impunity for grave breaches of human rights – and might even encourage such breaches in the face of certain impunity.

It is not contested that the United States exercises exclusive authority and control over Guantanamo Bay. International law does not allow the creation of an island outside of law where people are without rights.

CONCLUSION

This Court should hold that jurisdiction is proper and remand to determine two issues on the merits that have not yet been fully briefed: (a) whether wartime detentions without POW status or review by a "competent tribunal" do or do not violate the GPW and (b) whether the Executive has or has not provided whatever process may be constitutionally due Petitioners under the *Mathews v. Eldridge* test. By so doing, it will ensure that our system of justice is not marked by the "lasting stains" that deviation from this nation's proud history – and the practices of our closest allies – would otherwise leave.

Respectfully submitted,

MICHAEL H. POSNER
DEBORAH PEARLSTEIN
FIONA DOHERTY
LAWYERS COMMITTEE FOR HUMAN RIGHTS
333 Seventh Avenue, 13th Floor
New York, NY 10001-5004
(212) 845-5200

JONATHAN M. FREIMAN
Counsel of Record
CHRISTIAN TURNER
WIGGIN AND DANA LLP
One Century Tower
265 Church Street
New Haven, CT 06510
(203) 498-4400

Attorneys for Amici Curiae Bipartisan Coalition of National and International Non-Governmental Organizations

Dated: January 14, 2004

05 (215D)

Supreme Court, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

(35) (34)

Nos. 03-334, 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*, *Petitioners,*

v.

GEORGE W. BUSH, *et al.*, *Respondents.*

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*, *Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND JEWISH INSTITUTE FOR NATIONAL SECURITY AFFAIRS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: March 3, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Should the federal courts make themselves available to provide relief to a nonresident alien whom the Executive Branch has detained at an overseas location following its determination that: (1) the alien was captured overseas while fighting for a military force opposed to the United States; and (2) his detention is required to prevent him from returning to that military force while fighting continues?

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BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND JEWISH INSTITUTE FOR NATIONAL SECURITY AFFAIRS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, No. 03-1027, ___ U.S. ___ (Feb. 20, 2004); *Sosa v. Alvarez-Machain*, No. 03-339 (U.S., dec. pending); *Demore v. Kim*, 123 S. Ct. 1708 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001). WLF also filed a brief in this matter when it was before the court of appeals.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Jewish Institute for National Security Affairs (JINSA) is a non-profit, non-partisan educational organization

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

committed to explaining the need for a prudent national security policy for the United States, addressing the security requirements of both the U.S. and the State of Israel, and strengthening the strategic cooperative relationship between these two democracies.

Amici are concerned that, if the federal courts attempt to exert jurisdiction over the types of claims raised in these cases, the Executive Branch will be deprived of the flexibility necessary to confront the imminent threats posed to national security by terrorist groups throughout the world. *Amici* do not mean to denigrate the important liberty interests being asserted by Petitioners. Nonetheless, *amici* do not believe that the federal court system is the proper forum for reviewing those interests.

Amici are filing this brief with the consent of all parties. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

Amici hereby adopt by reference the Statement contained in the brief for Respondents.

In brief, in these consolidated cases the relatives of 16 men (two citizens of the United Kingdom, two citizens of Australia, and 12 citizens of Kuwait) are challenging their continued confinement at a United States military facility at Guantanamo Bay, Cuba. The 16 detainees were taken into custody in connection with the ongoing war against the al Qaeda terror network. The United States has determined that the 16 were fighting in Afghanistan and/or Pakistan on behalf of al Qaeda or its ally, the Taliban. The United States has further determined that although none of the Guantanamo Bay detainees is "entitled to POW privileges, they are to be

provided many of the privileges as a matter of policy" and are to be treated "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the Third Geneva Convention of 1949." *See* Office of the White House Press Secretary, "Fact Sheet: Status of Detainees at Guantanamo," *available at* www.whitehouse.gov/news/releases/2002/02/20020207-13.html.[2] The United States made those determinations without convening a "tribunal" to review Petitioners' detention status.

In early 2002, two groups of Petitioners filed suits in U.S. District Court for the District of Columbia challenging their relatives' continued detention. One group (the "*Rasul* Petitioners") filed a petition for a writ of habeas corpus;[3] it alleges that their relatives' confinement violates the Fifth Amendment and various federal statutes. The other group (the "*Al Odah* Petitioners") claims that it is not challenging confinement but rather the denial of "fundamental rights" during the confinement. In particular, the *Al Odah* Petitioners ask that their relatives "be afforded access to an impartial tribunal to review whether any basis exists for their continued imprisonment." *Al Odah* Pet. Br. 4. Both groups deny that any of the 16 ever fought on behalf of al Qaeda or the Taliban or against the United States; they contend that the 16 were

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[2] The United States determined that the Third Geneva Convention of 1949 (governing military detention status) does not even apply to al Qaeda members because al Qaeda "is not a state party to the Geneva Convention; it is a foreign terrorist group." *Id.* It further determined that while the Taliban is covered by the Convention, "the Taliban detainees do not qualify as POWs." *Id.*

[3] The petition was initially filed on behalf of three detainees; relatives of a fourth detainee, Mamdouh Habib, joined the petition several months later.

detained while in Afghanistan or Pakistan for peaceful purposes.

On July 30, 2002, the district court dismissed both actions with prejudice. *Rasul* Petition Appendix ("Pet. App.") 32a-64a. The court held that it lacked subject matter jurisdiction over the petitions.

The court ruled that the "exclusive avenue" for the relief sought by the *Al Odah* Petitioners -- in particular, the request for "a hearing before a neutral tribunal" -- was a petition for a writ of habeas corpus and thus that both actions should be deemed habeas petitions and judged accordingly. *Id.* at 46a. The court then concluded that jurisdiction over the habeas corpus claims was precluded by *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Id.* at 48a-63a.

On March 11, 2003, a panel of the U.S. Court of Appeals for the District of Columbia Circuit unanimously affirmed. *Id.* at 1a-29a. The appeals court agreed with the district court that *Eisentrager* was controlling and required dismissal for lack of jurisdiction. The court held that nonresident aliens without "property or presence in this country" have no rights under the U.S. Constitution, and:

> The consequence of this is that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not.

Id. at 12a.

The court rejected Petitioners' claims that they should be deemed to be within the United States because the U.S. military exercises "sovereign" power over Guantanamo Bay. *Id.* 14a-17a. The court also rejected Petitioners' other statutory bases for invoking jurisdiction (*e.g.*, the Alien Tort Statute, 28 U.S.C. § 1350, and the Administrative Procedure Act), finding that "'the privilege of litigation' does not extend to aliens in military custody and who have no presence in 'any territory over which the United States is sovereign.'" -- and that such aliens are barred from asserting *any* federal court claims, not simply habeas claims. Pet. App. 17a-18a.

This Court granted review on November 10, 2004, limited to the following Question: "Whether United States Courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."

SUMMARY OF ARGUMENT

Johnson v. Eisentrager, 339 U.S. 763 (1950), held that the federal courts are closed to the habeas corpus claims of aliens being held overseas by the United States, when the aliens at no time have been within the territorial jurisdiction of the United States. *Eisentrager* dictates that the lower courts' dismissal of this case on jurisdictional grounds be affirmed. The military inevitably will be distracted from its on-going war against al Qaeda if it is required to go into court to answer the charges of every nonresident alien who is upset over his long-term detention. There is no factual basis for asserting that the United States exercises sovereignty over Guantanamo Bay, Cuba (where Appellants are being held), and no amount of physical control over that site by the United States is sufficient to render *Eisentrager* inapplicable. Nor is it relevant that

Appellants deny that they are enemy combatants; *Eisentrager* denies access to the federal courts to *any* overseas aliens seeking release from detention, not simply those who admit to taking up arms against this country. Nor has *Eisentrager* been rendered obsolete by Senate ratification of various human rights treaties; none of those treaties grant rights enforceable by individuals in the federal courts.

Indeed, if the courts were to open their doors to Petitioners, it is unclear whether they could ever devise workable standards for reviewing claims of this nature. Military decisions are not susceptible of intelligent judicial appraisal. To avoid undue interference with military decision-making, courts likely would end up with highly deferential review standards that in most instances would rubber stamp the military's prior decision. Under those circumstances, it would be far preferable simply to maintain the current jurisdictional bar on all claims.

Finally, *amici* wish to emphasize that all press accounts suggest that the Guantanamo detainees are being well treated. Accordingly, the Court can affirm the appeals court's judgment without foreclosing entirely the possibility that some extreme forms of military misconduct might give rise to a cause of action in some later proceeding.

ARGUMENT

I. PETITIONERS' CHALLENGE TO THEIR DETENTION IS PRECLUDED BY *JOHNSON v. EISENTRAGER*, WHICH HELD THAT THE FEDERAL COURTS ARE CLOSED TO HABEAS CLAIMS FILED BY ALIENS RESIDING OUTSIDE THE COUNTRY

More than 50 years ago, the Court held in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that the federal courts are closed to the habeas corpus claims of aliens being held overseas by the United States, when the aliens at no time have been within the territorial jurisdiction of the United States. In the ensuing years, the Supreme Court has on numerous occasions cited *Eisentrager* with approval, and has given no indication that its continued vitality is in doubt. Petitioners' efforts to distinguish *Eisentrager* are unavailing.

At no relevant times have Petitioners had any meaningful connection with the United States. They were taken into custody in Afghanistan/Pakistan and later transferred to Cuba. None of the Petitioners makes any claim to American citizenship, to resident alien status, or to any other connection with this country. Accordingly, *Eisentrager* dictates a finding that the federal courts lack jurisdiction over Petitioners' challenge to their continued detention.

A. Petitioners' Characterization of *Eisentrager* as a Case That Did Not Limit Habeas Jurisdiction Cannot Be Squared with the Court's Principal Concern: Avoiding Proceedings That Would Hamper the Military's War Effort

Petitioners assert that *Eisentrager* cannot be accepted at face value; that despite numerous statements in the decision indicating that nonresident aliens are not entitled to seek writs of habeas corpus in American courts to challenge their overseas detention by American military authorities, the decision should be read as holding nothing more than that the petitioners in that case did not present meritorious claims. *See, e.g., Rasul* Pet. Br. 39-40; *Al Odah* Pet. Br. 29-34.

Petitioners' effort to re-write *Eisentrager* is unavailing. Most importantly, their revisionist interpretation fails to come to grips with a major policy consideration underlying the Court's decision: requiring military leaders to appear in civilian courts to explain their detention decisions -- particularly while war is ongoing -- is bound to distract them from their mandate to devote all available resources to prosecuting the war effort. Because Petitioners' briefs wholly ignored the relevant language in *Eisentrager*, *amici* quote it here at length:

> The writ, since it is held [by the German detainees] to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. *It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to*

> *submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.* Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Eisentrager, 339 U.S. at 779 (emphasis added).

Petitioners seek to use the federal courts as a forum in which to advance their claims that, despite their travel to the Afghanistan theater of war, they never took up arms against the United States. If the Court determines that the federal courthouse doors should be opened in this unprecedented manner, the military will be required to devote considerable resources to defending against Petitioners' claims, regardless what standard of review is imposed on the military's conduct and regardless whether those claims are ever demonstrated to have any merit. It was precisely to prevent the war effort from being distracted in this manner that *Eisentrager* closed the federal courts to habeas corpus claims from nonresident aliens being held overseas by the American military.

Petitioners note that the German detainees in *Eisentrager* were being held pursuant to a sentence imposed by a military tribunal following a trial at which they were permitted to raise a defense. But that distinction does not make the hampering effect of federal court intervention any less acute in this case. Moreover, that distinction is far less significant than Petitioners make it out to be. There is no contention in this case that the Executive Branch has failed to give thought to its rationale for holding Petitioners. To the contrary, the government is detaining Petitioners only after making an explicit determination that they took up arms against the

United States in support of al Qaeda or the Taliban.[4] Petitioners are unhappy with that determination. But just as *Eisentrager* declined to review the sentence imposed on the German detainees by a military tribunal (despite the detainees' assertion that the tribunal had acted improperly and had denied them their rights under the Geneva Convention of 1929), so should this Court decline to review the military's determination regarding Petitioners' culpability.

Amici note also that denial of review in this case is fully consistent with the rationale underlying the Court's historic deference to the Executive Branch in military matters and foreign affairs. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (quoting views of Congressman John Marshall (10 *Annuls of Cong.* 613 (1800)). The propriety of such deference has been well recognized since our Nation's founding. As Alexander Hamilton reasoned in the Federalist Papers:

> [T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms [a vital] and essential . . . definition of the executive authority.

The Federalist No. 74 at 447 (Clinton Rossiter, ed., 1961). *See generally*, H. Jefferson Powell, "The Founders and the President's Authority Over Foreign Affairs," 40 WM. & MARY L. REV. 1471 (1999).

Petitioners contend that the writ of habeas corpus historically has been available in situations of this sort. Tellingly, however, Petitioners have not cited even one decision in which a court reviewed the merits of a decision by its nation's military to detain, at an overseas location, a nonresident alien it deemed an enemy combatant. The absence of such case authority is hardly surprising: as *Eisentrager* noted, "the writ of *habeas corpus* is generally unknown" outside of the English-speaking world. *Eisentrager*, 339 U.S. at 779. The Court should reject Petitioner's efforts to evade *Eisentrager*'s well-reasoned rationale for limiting habeas jurisdiction.

B. *Eisentrager* Applies Without Regard to Whether Appellants Are Properly Classified as Enemy Combatants

The United States is detaining Petitioners because it has determined them to be enemy combatants captured in the Afghanistan theater. *Eisentrager* precludes judicial second-guessing of such military decisions; it held, under analogous facts, "that no right to the writ of *habeas corpus* appears." *Id.* at 781.

Petitioners nonetheless insist that *Eisentrager* is distinguishable because while they deny that they are enemy combatants, the petitioners in *Eisentrager* had been determined

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[4] *See* Fact Sheet, *supra* at 3. The government also determined that, under the Third Geneva Convention of 1949, Petitioners were not entitled to POW status, *id.*, and that the issue of such status apparently was sufficiently clear-cut that no tribunal needed to be convened for purposes of deciding the issue. Of course, whether Petitioners should be granted hearings regarding their POW status is not a principal focus of this suit, since gaining such status would not advance them toward their principal goal: freedom from detention.

by a military tribunal to be German combatants who had violated the laws of war. They insist that *Eisentrager* applies only to those aliens whose status as "enemy aliens" or "enemy combatants" is not in question.

Appellants are mistaken; *Eisentrager* is not so limited. If it were, *any* overseas alien challenging his detention by military authorities could evade *Eisentrager* entirely simply by denying that he is an enemy combatant. Indeed, even the *Eisentrager* petitioners would be granted access to the federal courts under Petitioners' interpretation of the decision, because they challenged the propriety of the military tribunals which had tried them and thus denied the validity of their convictions.

Eisentrager took as a given that the petitioners were "enemy aliens." *Eisentrager*, 339 U.S. at 777. But that statement needs to be understood in light of the Court's definition of "enemy aliens" or "alien enemies." The Court explained that "an alien enemy is the subject of a foreign state at war with the United States." *Id.* at 769 n.2. The petitioners thus qualified as alien enemies simply by virtue of their German citizenship and the fact that the state of war between Germany and the United States had not officially ended as of 1950. The Court made clear that access to the federal courts did *not* hinge on a petitioner being able to demonstrate that he was not an alien enemy. To the contrary, the Court recognized that "resident enemy alien[s]" (*i.e.*, those living in the United States) generally *are* permitted to invoke the protections of the federal courts, while "nonresident enemy alien[s]" generally are not. *Id.* at 776. Thus, it was the *Eisentrager* petitioners' nonresidency -- not their status as enemy aliens -- that was fatal to their claims. Indeed, if physical presence in the United States were not the key determinant, then *Ex parte Quirin*, 317 U.S. 1 (1942), would have been decided differently. In

Quirin, the Court exercised jurisdiction over the habeas corpus claims of German citizens being held captive in Washington, D.C., despite undisputed evidence that they not only were enemy aliens but also were enemy combatants.

The military has determined that Petitioners took up arms against our Nation; the propriety of detaining such people as enemy combatants is not lessened simply because they happen to be citizens of countries whose governments are on friendly terms with the United States. Indeed, the case for unfettered detention is far stronger in 2004 -- while the war against al Qaeda continues unabated -- than it was in 1950, when the threat from our Nazi enemies had long since faded.

C. *Eisentrager* Applies Without Regard to the Extent of the Physical Control the United States Exercises Over Guantanamo Bay

Petitioners apparently concede that the Naval Base at Guantanamo Bay is not territory over which the United States exercises ultimate sovereignty; they recognize that the area is part of Cuba. They argue nonetheless that *Eisentrager* does not preclude the exercise of federal court jurisdiction in this case because Guantanamo Bay is under effective control of the United States.

Petitioners' argument is without merit. American control of Guantanamo Bay does not serve to distinguish *Eisentrager*; were it true that federal courts have jurisdiction over habeas claims filed by any alien held in territory under effective American control, then the federal courts would be available to *all* aliens -- because by definition any alien being detained in United States custody is being held at a location that is under the effective control of the United States. Despite the *Al Odah* Petitioners' assertions to the contrary, the petitioners in

Eisentrager were being held in a military prison in post-World War II Germany that was under the effective control of the United States, but that fact did not prevent the Court from ruling that the federal courts lacked jurisdiction over their claims on grounds that the petitioners were outside territories over which the United States exercised sovereignty.[5]

Eisentrager repeatedly expressed the limits on federal court jurisdiction not in terms of "control," but in terms of whether aliens seeking access to the courts are within the territorial jurisdiction of the United States. For example, in describing the historical limits of federal court jurisdiction, the Court explained:

> [I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of *Yick Wo v. Hopkins*, the Court said of the Fourteenth Amendment, "These provisions are universal in their application, *to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; * * *." (Italics supplied.) 118 U.S. 356 [(1886)].

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[5] Similarly, in *Hirota v. MacArthur*, 338 U.S. 197 (1948), the petitioners (Japanese military leaders, including several facing death sentences) were being held in an Allied prison in Japan. The Court denied the habeas corpus petition on the ground that it had "no power or authority" to review the continued detention of the petitioners. *Id.* at 198. It so ruled, despite Justice Douglas's protests that the United States had effective control over the prison in which the petitioners were being held and thus that jurisdiction over the petition should have been proper under the appeals court's decision in *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949), *rev'd*, 339 U.S. 763 (1950). *Hirota*, 338 U.S. at 199-205 (Douglas, J., concurring in the judgment).

Eisentrager, 339 U.S. at 771.

Similarly, in explaining its refusal to open the federal courts to the German petitioners, the Court stated:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in this country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scene of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of the United States.

Id. at 777-78.

The Court on several occasions in recent years has cited *Eisentrager* with approval. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990), the Court held that aliens with "no voluntary attachment to the United States" were not permitted to invoke the Fourth Amendment to challenge a search by American authorities in Mexico. In support of that holding, the Court cited *Eisentrager* for the proposition that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Id.* at 269. More recently, the Court cited both *Eisentrager* and *Verdugo-Urquidez* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

In sum, Petitioners' lengthy arguments regarding the extent of American control over Guantanamo Bay amount to

nothing. In the absence of evidence that Guantanamo Bay is now United States territory over which its sovereignty is recognized, *Eisentrager* cannot be distinguished based on the location of Petitioners' detention.[6]

C. Treaties Ratified by the United States Since *Eisentrager* Was Decided in 1950 Have Done Nothing to Undermine The Decision

Petitioners also suggest that *Eisentrager* has been overcome by subsequent events and may no longer govern federal court jurisdiction. *Rasul* Pet. Br. 25-26. In particular, Petitioners point to several international human rights treaties adopted in recent decades that supposedly require the United States to open its courts to habeas corpus petitions from nonresident aliens being held overseas by the U.S. military. *Id.* 23-29.

Conspicuously absent from Petitioners' argument is any assertion that any of the treaties they cite were intended by Congress to create any enforceable rights. Regardless what Petitioners' version of customary international law may have to say about Petitioners' continued detention at Guantanamo Bay, it can have absolutely nothing to say about the scope of

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[6] *Amici* urge the Court not to decide this case based on some supposed distinction between Guantanamo Bay and other overseas locations over which the United States exercises effective control. Any such distinction would not be faithful to the language of *Eisentrager*, on which the military relied in good faith in choosing Guantanamo Bay as an overseas detention site. Moreover, any such decision would not resolve the more fundamental issue before the Court regarding habeas corpus jurisdiction, because one can safely assume that, if the United States loses this case and the decision is based on a factor unique to Guantanamo Bay, it will find another overseas location in which to house nonresident alien enemy combatants captured overseas.

federal court jurisdiction, which is strictly limited by the U.S. Constitution and federal statutes. In the absence of evidence that Congress intended, through ratification of one of those treaties, to create federal court jurisdiction where none previously existed, *Eisentrager* is unaffected.

Petitioners place particular reliance on the International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171. *Rasul* Pet. Br. 25-26 & n.28. Petitioners fail to note, however, as did Judge Randolph in the court below, that the ICCPR is a non-self-executing treaty; and that the U.S. Senate ratified the treaty on the basis that it created no enforceable rights in this country. Pet. App. 22a. Moreover, by its terms, the ICCPR is inapplicable to this case -- it only addresses a nation's treatment of individuals "within its territory." *See* ICCPR, Art. 2, para. 1. Moreover, Petitioners have cited no cases in which a nation's courts have applied the ICCPR or any other international human rights treaty to that nation's treatment of aliens captured overseas during military operations.

Petitioners note that the statute establishing habeas corpus jurisdiction, 28 U.S.C. § 2241, does not explicitly exclude jurisdiction over claims raised by overseas aliens. Citing the Supreme Court's rule that Congress will not be deemed to have repealed habeas jurisdiction unless it "articulate[s] specific and unambiguous statutory directives to effect a repeal," *INS v. St. Cyr*, 533 U.S. 289, 299 (2001), Petitioners argue that Congress should not be deemed to have repealed habeas jurisdiction over claims filed by overseas aliens who are not enemy combatants. *Rasul* Pet. Br. 13-15. But this is not a case, like *St. Cyr*, in which the government contends that Congress has intended to repeal pre-existing jurisdiction. Rather, *Eisentrager* makes clear that the federal courts *have never possessed* subject matter jurisdiction over

habeas claims filed by overseas aliens. Accordingly, *St. Cyr*'s presumption against repeals of jurisdiction by implication has no bearing on this case.

II. THE COURT SHOULD NOT OPEN THE COURTHOUSE DOORS TO HABEAS PETITIONS OF THIS SORT BECAUSE THE COURTS HAVE NO ARTICULABLE STANDARDS FOR DETERMINING THE MILITARY NECESSITY OF DETENTION DECISIONS

If the Court rules that the federal courts will henceforth be open to habeas corpus petitions filed by nonresident aliens being detained overseas by the U.S. military, courts will then have to address the level of review to be imposed on detention decisions. If, for example, a petitioner challenges the U.S. military's determination that he bore arms against the United States in support of al Qaeda, a court will need to determine such issues as who bears the burden of proof, and the types and quantum of evidence that can be used to carry that burden. *Amici* respectfully submit that: (1) in order to avoid interfering with military decision-making, of necessity the courts likely would adopt an extremely deferential standard of review; and (2) there is little reason to open the courthouse door with one hand if one ends up using the other hand to create almost insurmountable roadblocks for petitioners being detained overseas.

In his dissenting opinion in *Korematsu v. United States*, 323 U.S. 214 (1944), Justice Jackson described well the difficulty facing the judiciary when it seeks to review military decisions:

> In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Korematsu, 323 U.S. at 245 (Jackson, J., dissenting).

Many of the difficulties identified by Justice Jackson would arise in connection with any effort to assess the legality of military detention decisions. Military commanders in the field cannot afford to delay taking a potential terrorist into custody until evidence sufficient to support a criminal indictment can be compiled. Rather, on a daily basis, commanders must make numerous seat-of-the-pants decisions regarding who should be detained as potential terrorists. Surely, no one would claim that a detention decision is subject to reversal in the courts simply because, when challenged, the commander cannot point to definitive evidence of the detainees' ties with terrorists. Yet, if a detention decision is upheld in every such instance, courts risk becoming mere rubber stamps for military authorities.

Justice Jackson suggested that the preferred solution in such cases would be for the courts to decline to involve themselves in military proceedings, thereby maintaining institutional integrity and ensuring that the proceedings do not end up creating troublesome precedent:

> Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of

> Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.

Korematsu, 339 U.S. at 245-46 (Jackson, J. dissenting).

In order to avoid problems of the sort described by Justice Jackson, *amici* respectfully suggest that the Court reaffirm *Eisentrager* and hold that the federal courts are not open to habeas corpus petitions filed by nonresident aliens being detained in overseas facilities by U.S. military authorities.

III. ALL THE AVAILABLE EVIDENCE SUGGESTS THAT GUANTANAMO BAY DETAINEES ARE BEING WELL TREATED

Because the federal courts are not open to habeas corpus petitions filed by nonresident aliens, the nature of the complaints asserted by the Petitioners has no bearing on the viability of their petitions. *Amici* submit that the petitions would be subject to dismissal even if Petitioners alleged that they were being tortured by military officials.

Nonetheless, the Court need not go that far in order to affirm the judgment below. Petitioners' complaints consist almost entirely of alleged *procedural* shortcomings: *e.g.*, the military has not convened individual tribunals to determine whether any of the detainees is entitled to POW status, or whether any of them is an innocent civilian mistakenly caught up in a round-up of suspected terrorists. Under those circumstances, the Court can affirm the appeals court's judgment without foreclosing entirely the possibility that some extreme forms of military misconduct might be give rise to a cause of action in some later proceeding.

News accounts from those who have visited or been incarcerated at Guantanamo Bay attest to the generally good treatment afforded detainees. For example, a 15-year-old Afghan boy who was recently released from Guantanamo Bay stated that he had had a "good time" during his stay. *I Had a Good Time at Guantanamo, Says Inmate*, London Telegraph, February 8, 2004. A news account following his release stated:

> Mohammed Ismail Agha, 15, . . . said that he was treated very well and particularly enjoyed learning to speak English. . . . Mohammed said, "They gave me a good time in Cuba. They were very nice to me, giving me English lessons. . . . They gave me good food with fruit and water for ablutions and prayer." He said that the American soldiers taught him and his fellow child captives - aged 15 and 13 - to write and speak a little English. They supplied them with books in their native Pashto language. When the three boys left last week for Afghanistan, the soldiers looking out for them gave them a send-off dinner and urged them to continue their studies.

Id.

Petitioners argue that the principal reason that Guantanamo detainees generally have been well treated -- and that some have been released -- is the pressure they have placed on the Executive Branch by virtue of pursuing these lawsuits. That argument undervalues the importance of international political and diplomatic pressures that have been imposed on the Executive Branch to treat the detainees fairly. For example, the United Kingdom and Australia -- two close American allies in the war against al Qaeda -- have worked continuously to ensure that their citizens are treated fairly and eventually released. *See, e.g., Seven Britons in Guantanamo Could Be Freed*, London Telegraph, January 9, 2004 (reporting on negotiations between Britain and the United States, leading to preliminary agreement that seven of nine British subjects detained at Guantanamo (including Petitioner Shafiq Rasul) would be released in the near future).

Indeed, *Eisentrager* envisioned that issues regarding the treatment of military detainees would be resolved by just such non-judicial means. The Court stated that while the Executive Branch was not accountable in the *courts* for its actions with respect to nonresident alien detainees, it was nonetheless duty-bound to comply with all applicable statutes and treaties, and that compliance could be achieved without resort to the courts:

> We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be afforded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that

> the responsibility for observance and enforcement of these rights is upon political and military authorities.

Eisentrager, 339 U.S. at 949 n.14.

In sum, the public record indicates both that Guantanamo detainees have been well treated and that significant pressure has been brought to bear on the Executive Branch to ensure that it complies fully with all applicable statutes and treaties in its treatment of the detainees. Under those circumstances, there is no justification for this Court to break with established precedent by asserting jurisdiction over Petitioners' claims.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 588-0302

Counsel for *Amici Curiae*

Dated: March 3, 2004

(36) (35)

No. 03-334, 03-343

FILED
MAR 3- 2004

IN THE

Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

SHAFIQ RASUL, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF CITIZENS FOR THE COMMON DEFENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

CARTER G. PHILLIPS*
RICHARD D. KLINGLER
SIDLEY AUSTIN BROWN
& WOOD LLP
1501 K Street, NW
Washington, D.C. 20005
202-736-8000
202-736-8711 (fax)

Counsel for Amicus Curiae
*Counsel of Record

March 3, 2004

BEST AVAILABLE COPY

WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba.

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INTEREST OF *AMICUS CURIAE*[1]

Citizens for the Common Defence ("CCD") is an association that advocates a conception of robust Executive Branch authority to meet the national security threats that confront the nation in its war against international terrorists. The organization's name derives from the Preamble to the Constitution which recognizes that "to provide for the common defence" against foreign threats is one of the great objects of government our Constitution was meant to secure. Far from being inconsistent with "secur[ing] the Blessings of Liberty to ourselves and our Posterity," the vigorous executive power necessary to defend our nation against foreign enemies was seen by the Framers as a vital precondition to securing those blessings and an integral part of the same libertarian enterprise.

CCD's members are lawyers and law professors from across the country, most of whom served as law clerks to federal court judges or Justices of this Court, and/or as executive branch officials in the current or past Administrations. A partial list of CCD's members is included as Appendix A to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with a stark question: should the traditional understanding of habeas corpus jurisdiction be altered to permit habeas jurisdiction over foreign fighters being held by the U.S. military in its naval base at

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its members, and its counsel made a monetary contribution to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

Guantánamo Bay, Cuba? The answer to this question is no. If the Court—for the first time in history—interposes the federal judiciary between our armed forces and enemy belligerents held abroad, the Court will effect a dangerous and unprecedented revolution in the separation of powers and undermine the ability of the U.S. military to protect our citizens from attack.

1. This case must be analyzed under the legal framework applicable to war. Much of the criticism of the Guantánamo detentions derives, at least implicitly, from the mistaken view that the wartime legal framework is inapplicable. On the contrary, under both domestic and international law, the current global war against radical Islamist terrorist networks unquestionably qualifies as an armed conflict and triggers the full range of powers the President is authorized to employ when confronting threats to national survival.

The executive powers in question are those of the President as Commander-in-Chief, not those of the President as the nation's chief law enforcement officer. Likewise, the appropriate judicial role is measured not by the courts' traditional involvement in the administration of justice but rather by the courts' traditional non-involvement in military matters, including the use of force to subdue those the Executive concludes are enemy combatants. It would place this nation's core interests at grave risk to allow peacetime assumptions about the role and nature of judicial review to spill over into the wholly different context of war.

2. Within the legal framework of war, alien enemies held abroad receive no access to U.S. courts to seek judicial review of their detentions. *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950). Among many other reasons, this rule is dictated by fundamental considerations of separation of powers and military effectiveness. See *id.* at 777-79. Even under the Geneva Conventions, to whose protections Petitioners are not entitled, neither prisoners of war nor any other class of

protected person has any right of appeal to, or judicial review by, the civilian courts of the capturing power.

A reversal or modification of this Court's holding in *Eisentrager* would mark the first time that any nation has placed its domestic legal system at the disposal of those attempting to destroy it. Such a step not only defies common sense and millennia of practice, it threatens the orderly conduct of both judicial and military processes.

That the absence of judicial review may increase the risk of error in military detentions is no argument for such review: war inevitably entails numerous risks to the lives and liberties of innocents, friend and foe alike, that would never be tolerated in other circumstances. Moreover, the risks of judicial intervention in this context must also be taken into account, and they are intolerably high. The remedies for erroneous deprivations of liberty during wartime arise from sovereign-to-sovereign negotiations, such as those now ongoing in connection with the Guantánamo detainees.

3. Petitioners and their *amici* also claim that various international legal norms should lead the Court to overrule *Eisentrager*. Their "legal" sources either do not bind the United States or create no rights enforceable in Article III courts. Their arguments are essentially political, not legal, and they invite the Court to use the flimsiest bases to recast U.S. law based upon diplomatic considerations. Rather than have this Court reduce separation of powers conflicts by avoiding rulings that "violate" binding international law as established by the political branches, they would have this Court "conform" its rulings to "international norms" that place the Court at odds with the coordinate branches charged with conducting this nation's foreign affairs.

ARGUMENT

I. THIS CASE MUST BE ANALYZED UNDER THE LEGAL FRAMEWORK APPLICABLE TO WAR.

Proper resolution of this case requires an appreciation of one fact above all others: we are a nation at war. As the attacks of September 11th vividly illustrated, the threats posed to our national security by militant Islamic terrorism are as daunting and dangerous as any we have ever faced. As in other wars, the treatment by our military of enemies encountered on the global battlefield implicates a legal framework entirely distinct from that which applies to domestic criminal law enforcement.

As praiseworthy as modern presumptions of judicial review may be with respect to criminal law enforcement or domestic administrative action, they have no place in warfare, in which society's interest in self-preservation becomes paramount. Wars have never been fought successfully, by this or any other nation, with courts passing judgment on the use of force against those the Executive identifies as the enemy. When the nation is under mortal threat, the President as Commander-in-Chief must be free to protect the nation and use all force he deems appropriate to defeat the enemy, subject only to political and diplomatic constraints. This is fully consistent with our country's liberal traditions and system of laws; indeed, it is their fundamental guarantor.

1. The factual circumstances of the attacks of September 11th and our nation's response to those attacks plainly confirm that our nation is in a state of global armed conflict against militant Islamic terrorist organizations. See Br. of Law Professors et al., in Support of Resp. United States ("Brief of Law Professors") at 3-4. In the aftermath of the September 11th attacks, the President issued a formal finding that the attacks were "on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces." Military Order of November 13, 2001, Detention,

Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001).[2]

The determination that we are war is exclusively committed to the Executive Branch and binds this Court. In *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), this Court held that it is the President's prerogative to determine whether "a state of war exist[s]," *id. at* 666, such that actions authorized by the laws of war that would otherwise be impermissible may be undertaken. Because the President alone possessed the power to decide whether particular parties had assumed "the character of belligerents," this Court held that the judiciary "must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *Id.* at 670. The President's treatment of opposing parties as belligerents was "itself official and conclusive evidence . . . that a state of war existed." *Id.*[3]

2. The President's determination that we are at war is consistent with the standards under both U.S. law and the international law of armed conflict for determining when a state of armed conflict exists. Under both bodies of law, the existence of a state of war depends upon a fact-specific inquiry into the overall intensity and nature of violence being employed. See, *e.g.*, *id.* at 666 (a conflict "becomes [a war]

---

[2] NATO also took the unprecedented step of invoking the mutual defense provision of Article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

[3] *See also Ludecke* v. *Watkins*, 335 U.S. 160, 169 (1948) ("[The] termination [of a state of war] is a political act."); *The Three Friends*, 166 U.S. 1, 63 (1897) (executive has absolute authority to "determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed"); *The Protector*, 79 U.S. (12 Wall.) 700, 701-02 (1871) (relying on presidential proclamations to determine start and end dates of Civil War).

by its accidents—the number, power and organization of the persons who originate and carry it on"); *Prosecutor* v. *Tadic*, 35 I.L.M. 32, 54 (Int'l Criminal Trib. of the Former Yugoslavia 1995) (state of armed conflict "exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State" that is of sufficient intensity).

The state of war does not depend on formalities such as a declaration by Congress.[4] The vast majority of wars fought by the United States have not involved such a declaration. Nor is war limited to a conflict between two nation-states. Armed conflict with non-state actors perpetrating intense and organized violence, such as the militant Islamist terrorist groups this nation is currently fighting, also triggers the President's war powers and the legal regime associated with the use of those powers. Thus, at the outbreak of the Civil War, this Court upheld a naval blockade of the Southern states as an exercise of President Lincoln's war powers, holding that "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states." *The Prize Cases*, 67 U.S. at 666. The irregular warfare carried on against bands of Indians on the western frontier during the nineteenth century was likewise recognized as having the legal status of war, notwithstanding the fact that the Indians were not independent, sovereign

[4] *See, e.g., Bas* v. *Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (permitting Congress to authorize exercise of war powers involving seizure of foreign vessels in the Quasi-War with France absent declaration); *United States* v. *Anderson*, 38 C.M.R. 386 (C.M.A. 1968) (recognizing Vietnam conflict as war absent declaration); U.S. Army Field Manual, *The Law of Land Warfare*, FM 27-10, ch. 1, ¶ 9 (1956) ("[A] declaration of war is not an essential condition of the application of this body of law"); Existence of War with the Seminoles, 3 Op. Att'y Gen. 307 (1838) (war may exist "although no formal declaration of war has been made" and may exist even "without the sanction of Congress").

nations under classical international law. See, *e.g.*, *Montoya* v. *United States*, 180 U.S. 261 (1901); The Modoc Indian Prisoners, 14 Op. Att'y Gen. 249 (1873); Unlawful Traffic with Indians, 13 Op. Att'y Gen. 470 (1871). The international laws of armed conflict likewise recognize the general principle that non-state actors may engage in war and must therefore be bound by the laws of war. See, *e.g.*, Respect for Human Rights in Armed Conflict, G.A. Res. 2444, U.N. GAOR, 23d Sess., U.N. Doc. A/7433 (1968) (minimal standards of conduct set forth in common article 3 of the Geneva Conventions apply not only to governmental actors but also to "other authorities" responsible for "action in armed conflict"); *Prosecutor* v. *Tadic*, 35 I.L.M. at 54 (laws of war apply to "protracted armed violence between governmental authorities and organized armed groups").

3. That we are at war has two distinct implications for this case. The first concerns the judicial role. The President's quintessentially executive judgments here are committed to the President as Commander-in-Chief, and there are in any event no judicially manageable standards that could be applied to this uncertain context. The second is that, even if the issues in this case were justiciable, an entirely different legal regime from that applicable to domestic criminal law enforcement would apply. Cf., *e.g.*, *Middendorf* v. *Henry*, 425 U.S. 25, 49-50 (1976) (Powell, J., concurring) ("procedures in [courts-martial] were never deemed analogous to, or required to conform with, procedures in civilian courts"). This regime is validated by universal and longstanding historical practice, both in this nation and throughout the world.

At its most basic, when the President employs his Commander-in-Chief powers, as opposed to his law enforcement powers, the members of our armed forces acting at his direction violate no law when they deliberately kill others whom they perceive to be our enemies, even if their perceptions later turn out to be incorrect. The lives of

suspected enemies are taken with no necessary warning or process whatsoever, judicial or otherwise. See Ingrid Detter, *The Law of War*, 328-29, 336-39 (2d ed. 2000). Perceived enemy fighters who are not killed may be captured. No warrant need issue nor probable cause be established for these arrests. See Military Commissions, 11 Op. Att'y Gen. 297, 315 (1865). Prisoners captured by the military may be held without charge until the end of the conflict. See *id.*; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 118, 6 U.S.T. 3316, 3406, 75 U.N.T.S. 135, 224. While being held, they receive no *Miranda* warnings and are subject to uncounseled interrogation. And if charged with war crimes, they may be tried, convicted, and put to death following military commission proceedings in which the protections of Article III, the Fifth and Sixth Amendments, and civilian judicial review do not apply. See, *e.g.*, *Madsen* v. *Kinsella*, 343 U.S. 341 (1952); *Yamashita* v. *Styler* (*In re Yamashita*), 327 U.S. 1, 7 (1946); *Ex parte Quirin*, 317 U.S. 1, 10 (1942); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863); U.S. Const. amend. V. It is under this legal framework that petitioners' unprecedented claims to judicial review of their military detentions must be evaluated.

II. IN WAR, ALIEN ENEMIES CAPTURED AND HELD ABROAD HAVE NO RIGHT OF ACCESS TO DOMESTIC COURTS.

Much of Petitioners' rhetoric suggests that the government is seeking a war or emergency exception to the presumption of judicial review and the rule of law. This analysis both begs the question and assumes the wrong answer to the question it begs. Under the legal framework of war, alien enemies captured on foreign fields of battle and held by our military abroad are entitled to no judicial review, and upholding the rule of law means recognizing that the Constitution assigns the President as Commander-in-Chief the exclusive authority, subject only to diplomatic and political constraints, to identify

the enemy and determine the appropriate level and type of force to use in reducing him to submission.

A. Under *Johnson* v. *Eisentrager*, The Writ Of Habeas Corpus Is Unavailable To Foreign Enemy Combatants Held Abroad.

1. This case calls upon the Court to decide whether to overrule *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, this Court reviewed a decision of the D.C. Circuit which had held, precisely as Petitioners now contend, "that any person, including an enemy alien, deprived of his liberty anywhere under purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations," including rights under the Geneva Conventions, "would show his imprisonment illegal." *Id.* at 767. This Court decisively rejected that proposition. Invoking "the usual disabilities of non-resident enemy aliens," the Court concluded that it could "find no basis for invoking federal judicial power in any district" over a habeas petition from an enemy alien being held abroad. *Id.* at 781, 790. As the Court explained:

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

Id. at 768.

Petitioners' attempts to distinguish *Eisentrager* are unavailing. Even a casual reading of *Eisentrager* reveals that its holding did not depend on the main distinction offered by Petitioners: the fact that the *Eisentrager* petitioners were war criminals (*i.e.*, had already been convicted by a military commission) rather than preventive detainees (*i.e.*, prisoners of war or unlawful combatants who had not yet been charged). To be sure, the *Eisentrager* opinion alludes to the

petitioners' military trials and includes some discussion of issues relating to those trials. But the distinctions between types of lawful military detention played no part in the Court's reasoning. The Court simply declined "to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts," reversing the court of appeals' determination to "g[i]ve our Constitution an extraterritorial application to embrace our enemies in arms." *Id.* at 777, 781. Contrary to petitioners' arguments, convicted war criminals such as those in *Eisentrager*, who are suffering punitive detention and may be executed for their crimes, have a stronger—not weaker—argument for judicial review than ordinary wartime detainees like those at Guantánamo, who are, at least for the time being, merely being held out of the conflict and questioned.[5]

Petitioners' other principal attempt to avoid the holding of *Eisentrager* is based on the claim that the Court did not preclude jurisdiction but rather decided the claims before it on the merits, simply holding that relief was not available. This is not correct. The Court began its opinion by observing that "[t]he ultimate question in this case is one of jurisdiction of

[5] Whether or not they have been adjudicated war criminals, Petitioners must be regarded by this Court as enemy aliens for the same reason the Court so regarded the *Eisentrager* petitioners: they are individuals the Executive has encountered on foreign battlefields and determined to be hostile. *See, e.g., The Prize Cases*, 67 U.S. at 670 ("Whether the President in fulfilling his duties, as Commander-in-chief . . . [chooses] to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted . . . ."). Contrary to Petitioners' suggestions, their status as citizens of friendly nations confers no immunity from being properly classified as enemy belligerents. As noted, the current war is not being fought exclusively against state actors, so enemy status is not a function of nationality but of organizational affiliation and hostile activity. Every one of the nineteen 9/11 hijackers was also a citizen of a friendly country.

civil courts of the United States *vis-à-vis* military authorities in dealing with enemy aliens overseas." *Eisentrager*, 339 U.S. at 765; see also *id.* at 790 (concluding opinion by stating "we find no basis for invoking federal judicial power in any district"). The dissent understood the case the same way, observing that "[t]he Government's petition for certiorari here presented no question except that of jurisdiction" and criticizing the majority for including merits-related dicta that were unnecessary in light of the jurisdictional ruling. *Id.* at 792-93 (Black, J., dissenting).

Moreover, even if petitioners were correct that *Eisentrager* concluded only that the courts were without power to grant relief, that argument would not assist them. The policy considerations leading the Court to deny relief in *Eisentrager* apply equally if not more strongly here. See *id.* at 779. Concerns relating to the diversion of military resources, the "aid and comfort to the enemy" that would result from providing a forum for enemy belligerents to challenge our military commanders, the diversion of military and executive branch energies "from the military offensive abroad to the legal defensive at home," and the risk of "a conflict between judicial and military opinion" over the propriety of detentions are all concerns that apply whether *Eisentrager's* holding was jurisdictional or addressed the availability of relief. *Id.*

2. There is no reason to overrule *Eisentrager*. Even leaving aside the general importance of *stare decisis*, see, *e.g.*, *Bush* v. *Vera*, 517 U.S. 952, 985 (1996) (plurality); *Planned Parenthood of S.E. Pa.* v. *Casey*, 505 U.S. 833, 854-59 (1992) (plurality), and the need to avoid creating uncertainty and instability into the legal framework governing the conduct of war while our forces are engaged in active combat across the world, the holding in *Eisentrager* is as correct today as it was in 1950. As Respondents explain, if anything, both the domestic statutory and constitutional foundations of the opinion have been strengthened during the past half-century.

In addition to its firm grounding in U.S. law, *Eisentrager*'s understanding of judicial jurisdiction is confirmed by the universal practice of states.[6] No nation at war has ever provided lawyers to its captured enemies and invited them to sue in civilian courts, especially while active hostilities are still underway. Petitioners can point to no such examples.[7] Under the international laws of armed conflict, even a *lawful* combatant may be held for the duration of the conflict with no charges, no lawyer, and no judicial process. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra*, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224; *Ex parte Quirin*, 317 U.S. at 31 ("Lawful combatants are subject to capture and detention as prisoners of war by opposing

[6] The "'traditional notions of fair play and substantial justice'" referenced by Petitioners, Al Odah Br. at 24, are, to put it mildly, out of place in military operations. The principal tradition applicable to the conduct of military operations is to kill or otherwise incapacitate the enemy with as little warning as possible.

[7] The English precedents relied upon by *amici* Legal Historians do not address applications for habeas corpus by enemy combatants detained outside the country. *See Rex* v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (denying writ to prisoner-of-war held in Liverpool); *Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (same); *Sparenburgh* v. *Bannatyne*, 126 Eng. Rep. 837 (C.P. 1797) (prisoner held in England sued for payment on a contract made with the sovereign); *Sylvester's Case*, 87 Eng. Rep. 1157 (K.B. 1703) (per curiam) (person at issue was a *refugee* and "under the Queen's protection, which enables him to sue."); *Ex parte Anderson*, 121 Eng. Rep. 525 (Q.B. 1861) (non-combatant, non-wartime case involving British subject); *Ex parte Weber*, [1916] 1 A.C. 421 (habeas denied for enemy alien civilian interned in England); *The King* v. *Superintendent*, [1916] 1 K.B. 268 (same). In addition, no English precedent discussed stands for the general proposition that *de facto* control is the determinant of the Great Writ's reach. *See Rex* v. *Cowle*, 97 Eng. Rep. 587, 598 (K.B. 1759) (Writ found to extend to Borough of Berwick because "[t]he constitution [was] given to Berwick by the Crown of England, [and was] approved by Parliament."); *The King* v. *Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (writ extends to defendant *sent to* Isle of Gersey from England).

military forces."). Such a person receives counsel only if and when he is charged with a war crime. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra*, art. 99, 6 U.S.T at 3392, 75 U.N.T.S. at 210.

The Guantánamo detainees, all of whom have been classified as *unlawful* combatants by the President,[8] have far lower standing and far fewer rights under the international laws of armed conflict. See *Ex parte Quirin*, 317 U.S. at 31; *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956); William Winthrop, *Military Law and Precedents* 783 (2000); Detter, *supra*, at 144; U.S. Army Field Manual, *The Law of Land Warfare*, FM 27-10, ch. 3, ¶ 80-82 (1956). Unlawful combatants include saboteurs, spies, bands of marauders, guerillas, and terrorists, and they are treated as *hostis humani generis*, or "enemies to all humankind," because their failure to follow the customs and usages of war renders their violence particularly dangerous to non-combatants. See, *e.g.*, *Ex parte Quirin*, 317 U.S. at 31-32 n.10; *United States* v. *The Cargo of Brig Malek Adhel*, 43 U.S. 210, 232 (1844); Military Commissions, 11 Op. Att'y Gen. 297 (1865). To permit such detainees to sue the President and the Secretary of Defense would be to grant them rights that even honorable enemy soldiers do not have and that no captured U.S. serviceman has ever enjoyed.

The traditional absence of judicial review of the claims of captured enemy fighters finds powerful support in the constitutional separation of powers and the preeminent responsibility of the Executive in warmaking. Not only is it essential as a practical matter for the President to be able to make decisions involving the use of force in war quickly and without hindrance, but also the courts lack the institutional

[8] *See* Press Release, White House, Fact Sheet: Status of Detainees at Guantanamō (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

competence to superintend such decisions, which are intimately connected to rapid developments in intelligence, foreign affairs, and ongoing military operations.

Capture and detention of enemy combatants is a necessary incident of any military action. It constitutes a lesser use of force than dropping a bomb or firing a gun, but it is a use of force nonetheless. See, *e.g.*, *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004). And it has exactly the same basic purpose: to incapacitate those the armed forces identify as the enemy and prevent them from inflicting further harm on our citizens. See *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture is to prevent the captured individual from serving the enemy.").

Decisions regarding the use of force in a war are exclusively committed to the President. "The measures to be taken in carrying on war . . . are not defined [in the Constitution]. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution." *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870). This Court has repeatedly recognized the limitations on the judiciary's ability and power to review Executive determinations related to military affairs, national security, and foreign policy.[9] The capture and detention of enemy combatants is no exception. See, *e.g.*, *The Prize Cases*, 67 U.S. at 670. See also *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (per curiam) (1948) (Douglas,

[9] *See, e.g., Department of Navy* v. *Egan*, 484 U.S. 518, 529-30 (1988); *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Sumitomo Shoji Am.* v. *Avagliano*, 457 U.S. 176, 184-85 (1982); *Haig* v. *Agee*, 453 U.S. 280, 293-94 (1981); *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302-03 (1918); *Terlinden* v. *Ames*, 184 U.S. 270, 288 (1900).

J., concurring) ("For the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.")

It has also long been the case that enemy aliens outside U.S. territory are denied access to the U.S. court system, even if they are personally blameless in the hostilities, and even if all they wish to do is pursue ordinary civil claims. While this bar is today a function of positive law,[10] the principle "that war suspends the right of enemy plaintiffs to prosecute actions in our courts" long predates its codification. *Ex parte Colonna*, 314 U.S. 510, 511 (1942) (per curiam). This is not only a venerable rule of our common law but a staple of the law of nations. See *Eisentrager*, 323 U.S. at 776; *Masterson* v. *Howard*, 85 U.S. 99, 105 (1873); *Caperton* v. *Bowyer*, 81 U.S. (14 Wall.) 216, 230 (1871).

If ordinary citizens of enemy countries during war are disabled from suing U.S. citizens in U.S. courts to enforce commercial contracts, then unlawful enemy combatants surely cannot sue the President and the Secretary of Defense to force the military to release them. To hold otherwise would be not only to ignore unbroken historical practice but also the powerful underlying reasons why "[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security." *Eisentrager*, 339 U.S. at 774-75.

[10] Section 7 of the Trading with the Enemy Act bars from the U.S. courts "an enemy or ally of enemy prior to the end of the war." 50 U.S.C. app. § 7(b).

B. Reducing The Risk Of Erroneous Detention Does Not Justify The Costs of Judicial Intervention.

Petitioners portray themselves as innocent civilians mistakenly captured by the U.S. military in the chaos of battle. They suggest that allowing habeas review would reduce the risk that innocents such as themselves are being held in error at Guantánamo. Petitioners fail to recognize that even if both premises were true—and this is far from clear given the careful and comprehensive procedures the military has put into place to ensure that it detains only those who pose a threat, see Brief of Law Professors at 17-24—judicial intervention in military detentions during time of war would still be unjustified.

1. Risks To Innocents That Would Be Intolerable In Peace Are Inevitable In War.

In war, the President is empowered to authorize the use of extreme violence against our enemies with no judicial review. Every bullet fired or bomb dropped carries with it a risk of depriving innocents, including friendly forces and civilians, of their lives with no due process whatsoever. That military detentions similarly carry risks of erroneous deprivations of liberty does not mean that such deprivations are unlawful. Nor does it argue for judicial involvement in those decisions.

Even under the familiar balancing test of *Matthews* v. *Eldridge*, 424 U.S. 319 (1976), the reason is clear: the governmental interest in detaining those it believes to be enemies and neutralizing and interrogating them is so compelling that no marginal reduction in the risk that some innocents might be temporarily detained in error could overcome it. Potentially at stake each time our armed forces capture an individual believed to be an al Qaeda terrorist is the prevention of another September 11th, or worse.

In the civilian or peacetime context, our system of justice is designed to minimize the risk of erroneous loss of life, liberty, or property. But in warfare the priorities are different. All

military operations present at least some risk of error that might be reduced by judicial review.[11] Yet in war, decisionmaking with potentially dramatic consequences for innocents caught in the crossfire is always unreviewable. For example, a long line of precedent establishes that the destruction of property belonging to non-belligerents—with no predicate beyond the order of a military commander, and no review thereafter—is a non-compensable incident of warfare. See, *e.g.*, *United States* v. *Caltex (Phil.), Inc.*, 344 U.S. 149 (1952); *United States* v. *Pacific R.R.*, 120 U.S. 227 (1887). The rule is absolute and uncompromising: "The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. . . . The safety of the state in such cases overrides all considerations of private loss." *Id.* at 234. The loss of life is likewise immune from review or challenge in our courts: redress for our Navy's mistaken downing of an Iranian civilian airliner in 1988, for example, was obtained only through state-to-state negotiations. See generally 28 U.S.C. § 2680(j) ("combatant activities" exception to Federal Tort Claims Act).

This total preclusion of redress for harms incident to warfare applies even to U.S. servicemembers, who under *Feres* v. *United States*, 340 U.S. 135 (1950), and its progeny

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[11] Even in the absence of any error, severe and unredressed injury to civilians is often a direct and unavoidable collateral consequence of military action. *Cf.* United States Dep't of Def., *Report to Congress on the Conduct of the Persian Gulf War*, Appendix on the Role of the Law of War, 31 I.L.M. 612, 623 (Apr. 10, 1992) (discussing "the unfortunate inevitability of collateral civilian casualties and collateral damage to civilian objects" in most contemporary armed conflicts). Indeed, under the laws of armed conflict, the military may intentionally injure even enemy civilians in significant ways, such as seizing or destroying private property or requiring financial or in-kind contributions, all without any form of pre- or post-deprivation process.

are barred from recovery under the Federal Tort Claims Act for otherwise compensable injuries sustained in the course of duty. See *United States* v. *Stanley*, 483 U.S. 669, 686 (1987); *United States* v. *Johnson*, 481 U.S. 681, 692 (1987). Any exposure of military decisionmakers to liability for the consequences of their decisions would impermissibly "implicate[] the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." *Id.* at 691; *accord Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 673 (1977). Those unreviewable judgments are not limited to battlefield decisions but extend to all determinations colorably within the military command. See *United States* v. *Shearer*, 473 U.S. 52, 59 (1985).

There are no civilian analogues to the deliberate acts of violence and destruction that are the ordinary stuff of warfare. Indeed, the very notion of "collateral damage"—injuring or killing civilians or destroying civilian property without antecedent process and without compensation—is inimical to the most elementary principles of civil society. Yet in war, abbreviation or elimination of the legal process that largely undergirds civil society—and with it a risk of error that would be intolerable elsewhere—is not only acceptable but necessary to the effective conduct of hostilities.

2. The Costs Of Judicial Review Are High.

In the same way that a wartime legal framework requires us to accept higher risks of injury to innocents than would be acceptable outside of war, it also requires us to weigh more heavily the costs and burdens associated with judicial review of executive action.

In *Eisentrager*, this Court noted the serious costs associated with judicial review of military detentions of alien enemies held abroad during wartime. 339 U.S. at 779. As real and as serious as the consequences identified in *Eisentrager* are, they do not begin to exhaust the injury that would be done to the United States if captured enemy fighters held abroad by our

military were provided with lawyers and allowed to sue the President and the Secretary of Defense.

First, our military effectiveness would be degraded. Each habeas filing by a captured enemy fighter would present a public forum for making accusations against our military commanders and civilian leaders, creating irresistible opportunities to harass and embarrass, through false accusations, inflammatory or propagandistic pronouncements, or otherwise, our national leadership. Devoting military resources to defending judicial proceedings also necessarily diminishes the resources available for defending the country.

Second, in the current conflict, recognizing a right to pursue habeas corpus relief could have a disastrous impact on our ability to glean critical intelligence from those we capture. The process for which Petitioners contend would, of course, have to be extended to all similarly situated detainees—most of whom are unquestionably Taliban or al Qaeda terrorists and many of whom may possess information critical to the war effort or to preventing further mass casualty attacks in the United States. Giving each detainee access to counsel would make effective interrogation impossible. Not only would counsel advise the detainees not to answer questions from interrogators, but also the detainees themselves would be highly unlikely to cooperate knowing that they had a court case pending that might result in their freedom. In the meantime, critical intelligence, and with it our ability to prevent attacks or dismantle terrorist networks, would be lost. Moreover, giving detainees even the rudimentary information necessary to challenge their combatant designations could compromise sensitive intelligence, such as the identities of those who betrayed or took them into custody.

Third, against the risk of erroneous detention of the innocent must be weighed the possibility of erroneous release of the guilty. This is not speculative: the Department of Defense has recently revealed that even its own processes, which Petitioners contend are too restrictive, have resulted in

the release of individuals later found to have returned to the fight against us. See, *e.g.*, Lee A. Casey & David B. Rivkin, Jr., *The Facts About Guantanamo*, Wall. St. J., Feb. 16, 2004, at A6.

In a wartime legal framework, the normal risk calculus of the criminal justice system is upended: we have always erred and should continue to err on the side of ensuring that our adversaries are incapacitated so that our nation can achieve military victory as swiftly as possible, thereby saving lives and preserving civil liberties. The judicially-ordered release of individuals who later launch mass-casualty attacks against the United States, its civilian population, or critical infrastructure could be catastrophic.

Finally, there is no reason to believe a ruling in favor of Petitioners could be limited to those held at Guantánamo. If it could, it would be largely meaningless, as the military could simply transfer Petitioners and the other Guantánamo detainees to another U.S. facility abroad. If it could not, then this Court must confront the possibility that each of the tens of thousands of prisoners being held by U.S. forces at bases under our control in Iraq, in Afghanistan, in Diego Garcia, and elsewhere, including top al Qaeda leaders such as Ramzi Binalshibh, Abu Zubaydah, and Khalid Sheikh Mohammed, will soon stop talking to their interrogators and become civil plaintiffs in our courts. Indeed, even if the Court believed its holding limited to Guantánamo, the militant jihadists, Baathists, Taliban, and al Qaeda we have in custody elsewhere and their supporters in the American and international bar would likely not agree: any recognition of jurisdiction for enemy combatants held abroad could prompt a disastrous floodtide of litigation against our military and civilian leaders by captured enemies. It is difficult to imagine a more effective way to impair the war on terrorism and simultaneously undermine confidence in the federal courts.

3. Protection Of The Rights Of Military Detainees Occurs Through Diplomatic And Sovereign-To-Sovereign Negotiations.

To say there is no judicial remedy for foreign enemy combatant detainees who might be held in error does not mean there is no remedy. On the contrary, there is a time-tested, effective remedy for precisely such situations that is already well underway with respect to the Guantánamo detainees. Under the international laws of armed conflict, protection of the rights of captured fighters under the Geneva Conventions and otherwise occurs through diplomatic and sovereign-to-sovereign negotiations and not through private rights of action in court. See *generally* Detter, *supra*, 326-36; *Huynh Thi Anh* v. *Levi*, 586 F.2d 625, 629 (6th Cir. 1978); Geneva Convention Relative to the Treatment of Prisoners of War, *supra*, art. 132, 6 U.S.T. 3420, 75 U.N.T.S. at 238.

Such negotiations have been underway for many months with respect to the Guantánamo detainees and have resulted in the release or repatriation of numerous detainees. See, *e.g.*, Press Release, U.S. Dep't of Def., Transfer of Guantánamo Detainees Complete (Nov. 24, 2003), *available at* http://www.dod.mil/releases/2003/nr20031124-0685.html. These discussions are a far more efficient and effective means of resolving disputes over the status of particular detainees than judicial proceedings. Direct dealings between governments can include the sharing and mutual evaluation of sensitive intelligence information, in-person visits to detainees by diplomatic officials, negotiations over terms of release or repatriation, safeguards against future hostile activity of those released, and appropriate consideration by U.S. officials of the conduct of other nations in their treatment of U.S. persons. Whether captured fighters are citizens of hostile nations, friendly nations, or nations that fall into an ambiguous middle ground, their interests are best protected in the only way recognized under the international law of armed conflict and centuries of practice: by their own governments.

III. INTERNATIONAL LAW DOES NOT FURNISH A BASIS FOR FINDING JURISDICTION OVER CAPTURED ENEMIES HELD ABROAD.

Petitioners claim that "international legal norms" require a finding of jurisdiction in this case, but their analysis is exactly backwards. No binding international obligation requires the United States to open its courts to foreigners—much less unlawful combatants—detained overseas in times of war. Instead, Petitioners rely on a wildly broad conception of "international norms" applicable to U.S. legal disputes and of this Court's role in "conforming" U.S. law to a "global common law." That conception, if accepted, would enmesh this Court directly into the most contested diplomatic disputes this nation confronts, prematurely require resolution of a range of controversial claims regarding international legal obligations that the lower courts have rejected, and place this Court at odds with Congress and the Executive.

Petitioners Al Odah et al. claim to find an international law "right to an impartial tribunal" in the "universal consensus of the international community." Al Odah Br. at 40. Petitioners Rasul et al. find an international legal obligation to prevent "prolonged, arbitrary detention." Rasul Br. at 23. Petitioners contend that these obligations bind courts of the United States to hear their claims. Al Odah Br. at 25; Rasul Br. at 29. Both invoke the interpretative canon of *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), which states that U.S. statutes should be interpreted not to violate international legal obligations.

Each element of Petitioners' reasoning is profoundly wrong. Most basically, no principle of binding international law requires a nation's domestic courts to entertain claims by foreign fighters detained overseas during wartime, and Petitioners can point to none. International law imposes obligations on states. It governs dealings between and among sovereigns. A state structures its internal affairs as it wishes to discharge an international obligation, see generally

Restatement (Third) of the Foreign Relations Law § 711, cmt. h (1987), and the United States has clearly not sought to discharge its obligations to the detainees through involvement of Article III courts. Instead, the President has determined that military officers will discharge all international law obligations with respect to the Guantánamo detainees. Congress has not sought to unsettle the President's resolution of this diplomatic issue. Nor is there any basis for this Court to do so.

Petitioners attempt to avoid the clear implication of this black letter law and undisputed assertion of Presidential authority through three unsupportable strategems. One is to overstate the scope and sources of "international law" that bind the United States. Another is to conflate obligations of review that may arise from truly binding international law with obligations enforceable in Article III courts. The third is to invite this Court to import "global common law" into ambiguous U.S. statutes. All create severe separation of powers difficulties.

1. Petitioners rely heavily upon a variety of pronouncements by foreigners and foreign entities that have absolutely no binding effect on the United States, much less any applicability to Article III courts. Various statements by officers of foreign courts that are without jurisdiction over the United States; General Assembly resolutions; conventions, declarations, or treaties to which the United States has not assented or agreed; "sharp criticism from the international community" (Rasul Br. 27); and aspirational claims by law professors—all these are simply not sources of international law that bind the United States. See generally *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 165 (2d Cir. 2003) (and collecting cases).

Petitioners do not directly argue that the sources they cite are binding international legal principles recognized by and incorporated into U.S. law, nor could they. United Nations Resolutions, such as the U.N. Declaration of Human Rights

(Rasul Br. at 24-25 & n.27) "are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations." *Flores*, 343 F.3d at 165; see also *Haitian Refugee Ctr.* v. *Gracey*, 809 F.2d 794, 816 n.17 (D.C. Cir. 1987) (Universal Declaration "merely a non-binding resolution"); *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 168 (5th Cir. 1999). These principles apply even more strongly to exclude from customary or binding international law the comments of the U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment and by various U.N. working groups such as the Human Rights Committee (Rasul Br. 26, 28 & nn.31, 36).[12]

Petitioners also rely on decisions from the European Court of Human Rights and other international tribunals. But the European Court is a regional court that is not "empowered to create binding norms of customary international law." *Flores*, 343 F.3d at 169. It is only empowered to "interpret[]" and "appl[y]" the rules set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 ("European Convention"), an instrument applicable only to its regional State parties—not to create new rules of customary international law. Similarly, decisions of the Inter-American Commission on Human Rights are only precatory, and the Executive has acted to ensure that the United States is not bound by them. See *Garza* v. *Lappin*, 253 F.3d 918, 925 (7th Cir. 2001); *Roach* v. *Aiken*, 781 F.2d 379, 380-81 (4th Cir. 1986) (per curiam).

[12] "General Assembly resolutions and declarations do not have the power to bind member States because the member States specifically denied the General Assembly that power after extensively considering the issue . . . ." *Flores*, 343 F.3d at 165 (collecting sources).

Petitioners and supporting *amici* also rely on extralegal sources such as treaties which the United States has neither signed nor ratified, including the American Declaration of the Rights and Duties of Man (Rasul Br. 25 & n.29) and the American Convention on Human Rights (Al Odah Cert. Pet. at 24 n.23). The American Convention creates no rights binding upon or enforceable in U.S. courts.[13] And the American Declaration, promulgated by the Organization of American States "is an aspirational document which . . . did not on its own create any enforceable obligations on the part of any of the OAS member nations." *Garza*, 253 F.3d at 925. Petitioners similarly rely on comments, statements and speeches by foreign officials, including U.N. officials, and law professors. See Rasul Br. at 24 & n.24, 26, 28 & nn.31, 36. But such comments hardly constitute customary international law that binds the United States. See *United States* v. *Yousef*, 327 F.3d 56, 102 (2d Cir.), *cert. denied*, 124 S. Ct. 353 (2003).

These "international norms" are, at base, not sources of law at all but instead components of a diplomatic and political effort of the adversaries and erstwhile allies of the U.S. to make this nation's sovereign power subject to a highly contested conception of "international norms," international institutions, and "multilateralism." Indeed, this case can be viewed as one battle between those who invoke "international norms" and multilateralism to constrain the United States and those who believe that Article II empowers the Executive to defend the nation subject only to legal constraints applicable and deemed relevant by *U.S.* law, including the Constitution and those international legal obligations that U.S. law incorporates. That is, Petitioners rely upon and seek to have this Court endorse an essentially political position that is

[13] *See Flores*, 343 F.3d at 164; *Garza*, 253 F.3d at 925; *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring).

adverse to the interests of this nation as asserted by the Executive. Cf. *Printz* v. *United States*, 521 U.S. 898, 921 n.11 (1997) (holding "such comparative analysis [with international decisions] inappropriate to the task of interpreting a constitution"). Whatever general guidance foreign determinations may provide for purely domestic legal issues, cf. *Lawrence* v. *Texas*, 123 S. Ct. 2472, 2483 (2003), they cannot bind Article III courts with respect to matters subject to the core treaty, diplomatic, and war powers committed to other branches. See U.S. Const. art. I, § 8; *id.* art. II, §§ 1, 2.

2. Very significant separation of powers difficulties also attend Petitioners' reliance upon two sources of international law that can in fact bind the United States but which are not judicially enforceable. The first, the International Covenant on Civil and Political Rights ("ICCPR"), is a non-self-executing treaty that does not give rise to legal rights that can be enforced in U.S. courts.[14] Congress has enacted no implementing legislation for this treaty that could establish such rights, and for this Court to recast the treaty as providing such rights would represent a severe abrogation of Article I and Article II powers. In any event, the ICCPR is clearly inapplicable to Petitioners. The ICCPR has been interpreted by United States courts not to govern situations of war detention, and ICCPR is inapplicable to conduct by the United States *outside* its sovereign territory.[15]

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[14] *See Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d at 168; *Castellano-Chacon* v. *I.N.S.*, 341 F.3d 533, 544 (6th Cir. 2003); *United States* v. *Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir. 2002); *United State ex rel. Perez* v. *Warden, FMC Rochester*, 286 F.3d 1059, 1063 (8th Cir. 2002), *cert. denied*, 537 U.S. 869 (2002); *Hain* v. *Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), *cert. denied*, 537 U.S. 1173 (2003); *Igartua De La Rosa* v. *United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994).

[15] *See* ICCPR, Dec. 19, 1966, art. 2, 999 U.N.T.S. 171, 173 ("[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within* its territory *and* subject to its jurisdiction the rights recognized in the present Covenant") (emphasis added). In addition, treaties "normally do not have extraterritorial application unless such an intent is clearly manifested." *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

Petitioners also rely upon the law of war (Rasul Br. 27 & nn.33-35), which inherently raises separations of powers concerns. Even if it were appropriate for Article III courts to review the military's wartime detention policies under these standards, the Department of Defense has conformed its policies to applicable standards established by the law of war, including that established by the Geneva Conventions. See Brief of Law Professors at 17-24. More importantly, however, the nature of the international legal obligations at issue preclude such review by an Article III court. The Geneva Conventions impose duties and create rights between sovereigns, not between individuals and sovereigns such as may be enforced by private suits. *United States* v. *Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986) ("Under international law it is the contracting foreign government that has the right to complain about a violation."). They are non-self-executing treaties, and no domestic legislation implements those treaties to provide for rights enforceable in U.S. courts. See *Huynh Thi Anh* v. *Levi*, 586 F.2d 625, 629 (6th Cir. 1978).[16] Obligations under the Geneva Convention are "matter[s] for the executive and legislative departments," not for the judiciary to enforce. *Federal Trade Comm'n* v. *A.P.W. Paper Co.*, 328 U.S. 193, 203 (1946). Indeed, the limitation of individual rights created by such treaties is a deliberate

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[16] Absent domestic legislation explicitly providing for a private right of action, U.S. treaties and international agreements are normally irrelevant to interpreting a plaintiffs' rights in U.S. courts. See *Restatement (Third) of Foreign Relations Law* § 111(3) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary authority.").

decision not only of the Executive and Congress, but also of other nations that enter those treaties upon the same understanding of their limited scope. See, *e.g.*, Senate Comm. on Foreign Relations, *International Covenant on Civil and Political Rights*, S. Exec. Rep. No. 102-23, at 9, 19, 23 (1992), *reprinted in* 31 I.L.M. 645, 652, 657, 659 (1992).

3. The most significant separation of powers difficulty created by Petitioners' reliance on international "norms" arises from their invocation of *The Charming Betsy* canon, which they claim should compel the Court to render a decision in conformity with the various "international norms" they note. See Rasul Br. at 29; Al Odah Br. at 24-25. But *The Charming Betsy* in fact counsels against recognizing habeas jurisdiction: Petitioners would transform a principle designed to enforce separation of powers into a mandate to have Article III courts interfere widely and inappropriately in determinations committed to Congress and the Executive.

In *The Charming Betsy*, the Court indicated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." 6 U.S. (2 Cranch) at 118. The decision is grounded in the presumption that Congress would not seek to breach binding international obligations of the United States unless it made such intent clear. See *Restatement (Third) of Foreign Relations Law* § 115, cmt. a ("It is generally assumed that Congress does not intend to repudiate an international obligation of the United States . . ."). More broadly, the canon reflects separation of powers concerns by ensuring the pre-eminence of Congress in determining when and whether U.S. law will conform to international legal requirements, and requiring a clear expression of Congressional intent before settling on an interpretation that could interfere with the Executive's conduct of foreign policy. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers*, 86 Geo. L.J. 479 (1998).

The canon thus limits the Court's power relative to other branches whenever it is called upon to undertake interpretations that may touch upon international legal obligations. Modern cases have focused on such separation of powers underpinnings. See, *e.g.*, *Edward J. De Bartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol. 35, 38 (1997). For example, this Court has invoked the *Charming Betsy* canon to avoid extraterritorial application of an Act that could interfere with Executive determinations amidst "[t]he presence of . . . highly charged international circumstances." *McCulloch*, 372 U.S. at 21. It later characterized *McCulloch* as "the Court declin[ing] to read [an Act] so as to give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations." *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979).

Yet Petitioners and supporting *amici* seek to have the Court employ the *Charming Betsy* canon as authorization to apply a "global common law" derived from international "norms" that do not otherwise bind the United States or entitle claimants to enforce rights through Article III courts. See Brief of International Law and Jurisdiction Professors at 11. Petitioners thus invoke the decision to have the Court *conform* its decision to general international norms in contravention of contrary determinations by the political branches. This would turn the decision on its head. Finding no jurisdiction in this case would not "violate the law of nations," and thus the language and canon of *The Charming Betsy* assist Petitioners not one whit. As shown above, there is simply no principle of customary international law that requires wartime detainees to be granted access to a nation's courts. If, contrary to the decision's language, *The Charming Betsy* were read as a command to align U.S. law with non-binding international norms, then the decision would become

not a prudential rule of construction, but rather a grant of sweeping common law or legislative-like power to the federal judiciary. *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), precluded such a judicial role even for federal domestic matters. Any Article III federal common lawmaking power derived from international norms would trench upon not only the Executive's and Congress' treaty power, but also the Executive's power to conduct foreign affairs and—in wartime—to function effectively as Commander-in-Chief. For these reasons, courts have overwhelmingly declined to apply the *Charming Betsy* canon in the manner suggested by Petitioners and have instead recognized the limitations on judicial power in matters of foreign affairs. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438-43 (1989); *Princz* v. *Federal Republic of Germany*, 26 F.3d at 1166 (D.C. Cir. 1994).[17]

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

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[17] *See* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv. L. Rev. 2260 (1998). Even prior to *Erie*, this Court held that customary international law not codified in a statute or treaty did not present a federal question or "arise under" federal law. *See New York Life Ins. Co.* v. *Hendren*, 92 U.S. 92 Otto.) 286, 286-87 (1875); *Ker* v. *Illinois*, 119 U.S. 436, 444 (1886). The Court in *Erie*, in turn, left the federal courts with only a limited form of interstitial federal common law, to be applied only to further "a genuinely identifiable (as opposed to judicially constructed) federal policy." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 89 (1994).

Respectfully submitted,

CARTER G. PHILLIPS*
RICHARD D. KLINGLER
SIDLEY AUSTIN BROWN
& WOOD LLP
1501 K Street, NW
Washington, D.C. 20005
202-736-8000
202-736-8711 (fax)

Counsel for Amicus Curiae
*Counsel of Record

March 3, 2004

APPENDIX A

The following is a list of selected members of Citizens for the Common Defence:

Bradford A. Berenson
Richard D. Bernstein
Robert Bork
Steven Bradbury
Derek E. Brown
Adam H. Charnes
Miguel A. Estrada
David Frum
Eric George
Ed R. Haden
Charles C. Hwang
Wendy Keefer
Richard Klingler
Kris W. Kobach
Christopher Landau
Kevin P. Martin
Christopher D. Moore
Stephen J. Murphy, III
Ryan D. Nelson
John Osborn
Christopher Oprison
Mathew Rosengart
Eugene Volokh
John Yoo

Nos. 03-334 & 03-343

Supreme Court, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

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BRIEF OF *AMICI CURIAE* AMERICAN CENTER FOR LAW & JUSTICE, EUROPEAN CENTRE FOR LAW & JUSTICE & SLAVIC CENTRE FOR LAW & JUSTICE SUPPORTING RESPONDENTS

JEAN PAILLOT
EUROPEAN CENTRE FOR LAW & JUSTICE
4 Quai Koch
67000 Strasbourg, France
33 88249440

ANATOLY PCHELINTSEV
VLADIMIR RYAKHOVSKY
SLAVIC CENTRE FOR LAW & JUSTICE
Leninski Pr. 20, Entr. 5
Moscow, 117071 Russia
(095) 795-3979

JAY ALAN SEKULOW
Counsel of Record
THOMAS P. MONAGHAN
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON, SR.
JOEL H. THORNTON
ROBERT W. ASH
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., NE
Washington, DC 20002
(202) 546-8890

Attorneys for Amici Curiae

BEST AVAILABLE COPY

WASHINGTON, D. C. 20001

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ABBREVIATIONS KEY

Al-Joaid Brf	Brief of *Amicus Curiae* Abdullah Al-Joaid in Support of Petitioners
Al Odah Brf	Brief for Petitioners (Fawzi Khalid Abdullah Fahad Al Odah, *et al.*)
Commonwealth Brf	Brief for the Commonwealth Lawyers Association as *Amicus Curiae* in Support of the Petitioners
MP Brf	Brief of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Petitioners
Rasul Brf	Petitioners' Brief on the Merits (Shafiq Rasul, *et al.*)

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BRIEF OF *AMICI CURIAE* AMERICAN CENTER FOR LAW & JUSTICE, EUROPEAN CENTRE FOR LAW & JUSTICE & SLAVIC CENTRE FOR LAW & JUSTICE SUPPORTING RESPONDENTS

INTEREST OF *AMICI*[1]

Amicus American Center for Law and Justice (ACLJ) is a not-for-profit organization committed to upholding the

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[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, the *amici* disclose that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

integrity of our constitutional system of government based on separation of powers. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before this Court. ACLJ lawyers have argued numerous cases involving constitutional issues before lower federal courts and state courts throughout the United States. The ACLJ is very concerned about Petitioners' attempts to expand the coverage of United States domestic law to protect and benefit unlawful enemy combatants captured by American or allied forces overseas and presently detained at the Guantanamo Naval Base in Cuba. To do so, Petitioners seek to subvert the well-established authority of the Executive to deal with the exigencies of war in all its facets and to transfer such authority to the Judiciary. Yet, neither the domestic law of the United States nor the 1949 Geneva Conventions permit captured enemy combatants to challenge the legality of their detention in the domestic courts of the detaining power—the United States—during wartime. The ACLJ urges this Court to affirm the appellate court's denial of Petitioners' arguments.

Amicus European Centre for Law and Justice (ECLJ) is a French Association, located in Strasbourg, France, which deals with human rights issues in Europe. *Amicus* Slavic Centre for Law and Justice (SCLJ) is a human rights organization located in Moscow, Russia. ECLJ and SCLJ attorneys have a number of cases currently on application before the European Court of Human Rights and have argued cases before national courts in Europe. Both *amici* are concerned with upholding the rule of law and with maintaining the integrity of the international law of war. Both *amici* agree that allowing enemy combatants—whether lawful or unlawful—to challenge the legality of their detention in the courts of the detaining power during wartime was never foreseen by the 1949 Geneva Conventions and should not now be read into the Conventions.

SUMMARY OF ARGUMENT

The underlying facts at issue in this matter are well-known and need little elaboration. On September 11, 2001, members of the *al-Qaeda*[2] terrorist organization[3] forcibly hijacked civilian airliners in the United States and used them as weapons to attack the World Trade Center towers in New York City and the Pentagon in northern Virginia. A fourth plane crashed in Pennsylvania when airline passengers thwarted the hijackers' mission. As a result, thousands of United States citizens, as well as hundreds of foreign nationals, were killed. The President of the United States took immediate steps as Commander-in-Chief of the armed forces to protect the Nation against further such attacks.

Within days of the attacks, the United States Congress, agreeing with the President that the attacks on the United States constituted acts of war, authorized the President to use military force in response. The President ordered United States armed forces to seek out and destroy the terrorists responsible for the attacks and those who give them safe haven. The President also called on all civilized nations of the world to join the United States in the war on terrorism. Less than one month after the attacks on our soil, United States armed forces took the war to the enemy in Afghan-

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[2] Because Arabic words must be transliterated into English, there are often different spellings. For example, "*al-Qaeda*" is often transliterated as "*al-Qaida*." To avoid confusion, "*al-Qaeda*" will be used in this brief. Where that term is transliterated differently in a source cited in this brief, it will be changed to the above spelling without further notation.

[3] *Al-Qaeda* is "a transnational organization with global ambitions. Its tactics are illegal, but its goals are political. Indeed, they are geopolitical—to drive American influence from the Islamic world, to establish a new caliphate there and to renew the medieval war for dominance between Islam and the West." David B. Rivkin, Jr., et al., *The Law and War*, part 1, Wash. Times (Jan. 26, 2004) ("Rivkin1") at A__. Moreover, on 9-11, "*al-Qaeda* did what few modern states can do—it projected power." *Id.*

istan. Many members of the *al-Qaeda* terrorist organization and their Taliban allies were killed or captured in the ensuing fight. The President ordered the most dangerous of the enemy combatants taken captive to be flown to Guantanamo Bay Naval Base in Cuba to be detained there. The war on global terrorism continues unabated, and enemy combatants continue to be captured around the world and taken to Guantanamo for detention.

The instant matter before this Court concerns the attempt by family members of certain Guantanamo detainees to challenge in United States courts the legality of the detainees' detention. Nothing in the laws of the United States or the 1949 Geneva Conventions permits captured enemy com batants to challenge the legality of their detention in the courts of the detaining power during wartime. The issues Petitioners raise—for example, being held without trial, lack of access to counsel, and lack of a set end date for their detention—all sound in domestic criminal law.

Domestic criminal law, however, is inapplicable to the Petitioners. Although they appear not to grasp the significance of it, the United States is in an actual war. The Nation's armed forces are actively engaged in military combat operations overseas against an actual enemy. Casualties are occurring on a regular basis.

Petitioners argue further that Petitioner-detainees are not enemy aliens, because they come from nations friendly to the United States. *See, e.g., Rasul* Brf at 2, 9; *Al Odah* Brf at 4, 8, 14. This, of course, is a non-sequitur. By taking up arms against the United States, Petitioners became enemies of the United States, irrespective of the otherwise friendly relations between the United States and the country of the respective detainee's citizenship. Even citizens of the United States, this Court has held, become enemy combatants when they take up arms against the United States. *See Ex Parte Quirin*, 317 U.S. 1, 37 (1942). Hence, this Court should dismiss Petitioners' arguments and should affirm the lower courts' denials of Petitioners' writs.

ARGUMENT

Petitioners charge that detaining persons at Guantanamo Naval Base—without trial, without access to lawyers, and with no set date for their release—violates numerous constitutional rights, including the rights to due process of law, to a speedy and public trial, and to counsel.[4] *See, e.g., Rasul* Brf at 2, 4, 5, 7, 9, 32; *Al Odah* Brf at 3, 4, 10, 12, 14, 37, 39. Yet, the Guantanamo detainees are not criminal suspects. Rather, they are enemy combatants captured during the ongoing war on terrorism. Their detention is preventive—to ensure that they do not again take up arms against United States forces—not punitive.[5] Hence,

> [t]he most important legal question *** is whether the United States is actually "at war." *** Indeed, much of

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[4] Rivkin1 at A__.

[5] This is not to say that charges may not be brought at some point. The President's Order establishing Military Commissions anticipates that some detainees may indeed be tried for war crimes. *See* 66 Fed. Reg. 57,833 (Nov. 16, 2001). Moreover, "unlawful" belligerency is itself a war crime for which the "unlawful combatant" may be justly tried under international law. As this Court aptly noted in *Ex Parte Quirin*, 317 U.S. 1 (1942),

> [b]y universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war **** *Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.*

Id. at 30-31 (emphasis added). This Court noted further, regarding "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property," that such belligerents "are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals." *Id.* at 31.

> the opposition to the detentions is based on an implicit (or explicit) denial that the United States is engaged in anything other than a new and challenging criminal law enforcement effort, more like "the war on drugs," than Vietnam, Korea, or World War I and World War II.[6]

As will be shown *infra*, the United States is actually "at war" in the sense of Vietnam, Korea, and the two World Wars rather than in the sense of "the war on drugs," which is, and always has been, primarily a law enforcement effort. Hence, it is the law of war that governs United States conduct regarding the detainees and the detainees' legal status, not the United States domestic criminal justice system with its well-established rights, protections, and obligations. The detainees at Guantanamo are captured enemy combatants, not criminals under United States domestic law.

I. THE UNITED STATES IS ACTUALLY AT WAR.

A. Under the Laws of the United States, the Nation is at War.

Following *al-Qaeda*'s unprovoked attacks on the World Trade Center towers in New York and on the Pentagon in Virginia and the crash in Pennsylvania of a fourth hijacked civilian airliner, President Bush, in his role as Commander-in-Chief, took immediate action to protect the Nation. Those heinous attacks, by themselves, created a state of war between the United States and *al-Qaeda* and its allies, obliging the President, as Commander-in-Chief, to take action.[7] *See The Prize Cases*, 67 U.S. (2 Black) 635, 668

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[6] Rivkin1 at A__.

[7] Just as President Roosevelt noted, regarding the Japanese attack on Pearl Harbor, that a state of war existed between the United States and the Empire of Japan *prior to* a formal Congressional declaration of war, *see* http://bcn.boulder.co.us/government/national/speeches/spch.html, so, too, did a state of war exist immediately following the 9-11 attacks upon

(1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. ***").[8] Further, it is the President, as Commander-in-Chief, who determines whether those who threaten the Nation have "the character of belligerents," and, once that decision is made, the courts "must be governed by the decisions and acts of the political department of Government to which this power is entrusted." *Id.* at 670; *see also In Re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power *** is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy *** evils which the military operations have produced.").

The Congress, agreeing with the President that the attacks constituted acts of war, enacted legislation authorizing the President to use military force to respond to the attacks. Pub. L. No. 107-40, 115 Stat. 224 (2001) ("President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."). This Congressional action constituted a *de jure* authorization of war and ratified the President's actions. *See, e.g., Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (holding how Congress gives its consent to engage in war to be "a discretionary matter for Congress to decide in

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the United States, despite the lack of Congressional action. *See also The Pedro*, 175 U.S. 354, 363 (1899) (recognizing that war with Spain began prior to an actual declaration by Congress based upon a prior declaration of the Spanish government).

[8] Even the *Al Odah* Petitioners agree with this Court that "'no governmental interest is more compelling than the security of the Nation.'" *Al Odah* Brf at 42 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

which form *** it will give its consent;" "[a]ny attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences"); *see also The Prize Cases*, 67 U.S. at 668; *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) ("Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time**** What, then, is the nature of the contest subsisting between America and France? In my judgment, it is a limited, partial, war. *Congress has not declared war in general terms; but congress has authorised hostilities* ****") (emphasis added); Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in*, 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987) ("when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory").

B. Under International Law, the United States is at War.

The United States military response was not only authorized by the laws of the United States, but by international law as well. *See, e.g.*, U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"). The right to national self-defense when attacked was immediately reaffirmed by the UN Security Council in Security Council Resolution 1368, adopted on September 12, 2001. U.N.S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001). Resolution 1368 expressed the Security Council's determination "to combat *by all means* threats to international peace and security caused by terrorist acts." *Id.* (emphasis added).

Consistent with article 51 of the UN Charter, various regional alliances of which the United States is a member

have determined the 9-11 attacks to be acts of war. Accordingly, those regional alliances have invoked the mutual defense provisions of their respective treaties. The North Atlantic Council, for example, condemned the "barbaric acts" committed against the United States and recognized the "urgency of intensifying the battle against terrorism, a battle that the NATO countries—indeed all civilised [sic] nations—must win."[9] In fact, *for the first time in the history of the Alliance*, NATO implemented article 5 of the North Atlantic Treaty, which states "that an armed attack on one or more of [the Allies] in Europe or North America shall be considered an attack against them all." *See* North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243. Article 5 specifically authorizes the "use of armed force" as a means to deal with such attacks on member states. *Id.*

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[9] North Atlantic Council, *Statement on the Terrorist Attacks*, Sept. 11, 2001, available at www.patriotresource.com/wtc/intl/0911/nato2.html. And, as this Court noted in *Hirabayashi v. United States*, 320 U.S. 81 (1943),

> [t]he war power of the national government is "the power to wage war successfully." *** It extends to every matter and activity so related to war as substantially to affect its conduct and progress. *** It embraces every phase of the national defense **** Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the means of resisting it**** Where *** the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

Id. at 93 (internal citations omitted).

Similarly, the United States and Australia invoked, *for the first time in the history of the ANZUS Pact*, article IV of the ANZUS Treaty, which reads, in pertinent part: "Each Party recognizes that an armed attack *** on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger ****" *See* Security Treaty Between Australia, New Zealand and the United States of America, Sept. 1, 1951, 131 U.N.T.S. 83, 86; Press Release Announcing Application of the Anzus Treaty, Sept. 14, 2001.[10]

Likewise, on September 21, 2001, the Foreign Ministers of the Organization of American States adopted a resolution recognizing that the attacks on the United States were also attacks against all American states that triggered the reciprocal assistance provision of the Rio Pact. *See* Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3(1), 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 95; OAS Resolution on Terrorist Threat to the Americas, OEA/Ser.F/II.24, RC.24/RES.1/01, Sept. 21, 2001.[11] [12]

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[10] Available at www.patriotresource.com/wtc/intl/0914/australia.htmnl.

[11] Available at www.yale.edu/lawweb/avalon/sept_11/oas_0921a.htm.

[12] Many world leaders also roundly condemned the attacks. *See* generally www.patriotresource.com/wtc/intl for statements by various world leaders. For example, Australian Prime Minister John Howard, who was visiting Washington on September 11, 2001, described the attacks as another "day of infamy" and promised the United States that Australia would support whatever action the United States chose to take "to properly retaliate *** to these acts of bastardry against their citizens." Danish Prime Minister Rasmussen, in addressing the opening session of the Danish Parliament, noted that the terrorist attacks on the United States were "a ruthless assault on everything we represent" and that it is "of decisive importance that the democracies strike back," including with "military pressure." Then-Foreign Minister John Manley of Canada noted that, although the attacks "took place over U.S. skies and on U.S. land, *** they were an attack against us all." German Chancellor Schroeder, in his statement to the German Parliament, repeatedly described the attacks on the United States as a "declaration of war" on the free world as a whole and on Western values. Norwegian Foreign Minister Jagland described the attacks as attacks "on all open and democratic societies" and declared that all NATO members must be ready to play their parts in combating such acts. UK Prime Minister Tony Blair stated that "[t]his is not a battle between the United States of America and terrorism, but between the free and democratic world and terrorism." French President Jacques Chirac, in his address to the French people, made the following observation: "Never has any country in the world been the target of terrorist attacks of such scope or such violence."

* * *

Clearly, the events of 9-11 marked the entry of the United States into the war on terrorism every bit as much as the events of December 7, 1941, marked America's entry into the Second World War. The President, the Congress, United States allies, and key international bodies have all recognized that the attacks on the United States were acts of war and have responded accordingly.

In contrast, Petitioners and their *amici* fail to grasp this reality. Petitioners seem to believe that the events of 9-11 were merely especially egregious criminal acts which the criminal justice system was meant to prosecute. Petitioners wish to treat 9-11

> as a law enforcement problem, where "suspects" must be indicted, arrested (without excessive force) and processed through the civilian justice system, instead of war, where enemies can be attacked without notice and captives held until victory ****[13]

To determine whether United States courts have jurisdiction to hear Petitioners' causes, this Court must first decide whether the events of 9-11 represented merely criminal acts for which the United States criminal justice system is to provide resolution or whether 9-11 represented the commencement of war against the United States for which the military and political forces of the Nation and the law of

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[13] Rivkin1 at A__.

war are the proper tools. Such a determination cannot be made in a vacuum. The President of the United States has determined that the attacks were acts of war, not criminal acts. The Congress has likewise determined that the attacks were acts of war, not criminal acts. America's closest allies acting individually and through our various alliances have also concluded that the 9-11 attacks constituted acts of war, not merely criminal acts. Petitioners and their *amici*, on the other hand, by stressing the well-established legal rights and obligations of the American criminal justice system, erroneously argue otherwise.

II. THE EXISTENCE OF ARMED HOSTILITIES TRIGGERS APPLICATION OF THE LAW OF WAR.

Under international law, the existence of armed conflict is sufficient to trigger the law of war and its rules for dealing with belligerents. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, art. 2, 6 U.S.T. 3316, T.I.A.S. 3364. And, part and parcel of any war is the capture and detention of enemy combatants. In fact,

> [t]he right to detain enemy combatants during wartime is one of the most fundamental aspects of the customary laws of war and represented one of the first great humanitarian advances in the history of armed conflict. *** [T]he right to detain enemy combatants in wartime is so basic that it has rarely been adjudicated [in U.S. courts.] *** It is an inherent part of the president's authority as commander-in-chief, and was well-known to the Constitution's framers. Alexander Hamilton addressed this very point in 1801 **** Hamilton noted that "[w]ar, of itself, gives to the parties a mutual right to kill in battle, and to capture the persons and property of each other" and that the Constitution does not require specific congressional authorization for such actions, at least after hostilities have commenced. Indeed, he wrote, "[t]he framers would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and convenience."[14]

Over the last century, international conventions have sought to regulate the incidents of war in order to protect, *inter alia*, the health, safety, and dignity of combatants who fall into the hands of the enemy. Such conventions set forth rules to govern what is and is not permissible in war. Combatants who fall into enemy hands complying with the rules set forth in the conventions are afforded certain explicit legal protections, whereas combatants who are captured in non-compliance enjoy only basic humane standards of treatment according to the customs of war. Moreover, such combatants may also be prosecuted for war crimes.

A. In Order to Be Lawful Combatants, Forces Must Fully Comply With the Requirements Set Forth in the Hague and Geneva Conventions.

The 1907 Hague Convention set forth four requirements to be fulfilled before belligerents would be recognized as lawful combatants: (1) have a responsible command structure; (2) wear a fixed distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) operate in accordance with the laws and customs of war. *See* Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), art. 1. Failure to meet the requirements made a belligerent an unlawful combatant, which, in itself, was a war crime.

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[14] David B. Rivkin, Jr., et al., *The Law and War*, part 2, Wash. Times (Jan. 27, 2004), at A19 (quoting Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in*, 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987)).

The 1949 Geneva Conventions retained the four Hague requirements. Article 5 of the GPW determines to whom the GPW applies: "The present Convention shall apply to all persons referred to in Article 4 ****" *A fortiori*, the GPW does not apply to those *not* referred to in article 4. Article 4 of the Convention lists the categories of persons who qualify to be prisoners of war ("POW"), *i.e.*, who qualify to be protected by the terms of the Convention, when they fall into enemy hands. The protected categories are as follows:

> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict *** *provided that such militias and volunteer corps *** fulfil the following conditions*:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.[15]

[15] The GPW made clear that "members of ad hoc citizen militias and volunteer corps, including members of an 'organized resistance movement,' could be considered to be lawful combatants, entitled to the status of prisoner-of-war upon capture, *but only if they met the four Hague Regulation conditions*." Lee A. Casey, et al., *Unlawful Belligerency and Its Implications Under International Law*, *available at* www.fed-soc.org/Publications/Terrorism/unlawfulcombatants.htm. ("Casey, *Unlawful Belligerency*"). *See also id.* (the ICRC noted in its commentary on the GPW that "there was unanimous agreement about the necessity for partisans to fulfill the conditions laid down in Article 1 of the Hague Regulations and to have an adequate military organization so as to ensure that those conditions could be fulfilled, in order for them to qualify as 'prisoners-of-war'"). The requirements in this subcategory merely reflect the inherent characteristics of a Nation's regular armed forces, to wit, the existence of a responsible command hierarchy, the wearing of a uniform distinguishing the military forces from the civilian population, the open bearing of arms, and a commitment to obeying and enforcing the laws and customs of war.

> (3) Members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power.
>
> (4) Persons who accompany the armed forces without actually being members thereof *** provided that they have received authorization from the armed forces which they accompany ****
>
> (5) Members of [certain merchant marine and civil aircraft crews].
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having time to form themselves into regular armed units, *provided they carry arms openly and respect the laws and customs of war.*

GPW art. 4 (emphasis added). Failure to fulfill the Hague requirements for lawful belligerency places the offender outside the protections of the GPW. *See* GPW art. 5 ("present Convention shall apply to the persons referred to in Article 4," which in turn enumerates the lawful belligerency requirements).

Moreover, as this Court noted in *Ex Parte Quirin*, unlawful combatants, like lawful combatants, are "subject to capture and detention, but *in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful*." 317 U.S. at 31 (emphasis added).[16]

[16] American citizens may also be "enemy combatants" with respect to the United States: "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction

B. Members of *Al-Qaeda* Do Not Meet the Requirements of Lawful Belligerency and Are, Therefore, Unlawful Combatants Not Protected by the Geneva Convention Relative to the Treatment of Prisoners of War.

There is little doubt that the members of *al-Qaeda* are unlawful combatants under both the Hague Regulations and Geneva Conventions of 1949, as well as customary international law. Although *al-Qaeda* has undertaken military-style attacks, against the United States and others, *i.e.*, it has engaged in "belligerency," its fighters do not operate under a "responsible" command structure, do not wear uniforms [*i.e.*, a distinctive sign], do not carry arms openly, and do not conduct their operations in accordance with the laws and customs of war. Failure to meet any one of these requirements would be sufficient to cast *al-Qaeda*'s operatives into the category of unlawful combatant. They meet none of them.[17]

Since members of *al-Qaeda* meet none of the four Hague requirements, they are unlawful combatants not protected by the terms of the GPW, including article 5, which provides for a hearing before "a competent tribunal" if there is any doubt as to the detainee's status with respect to the article 4 categories. Nevertheless, the Secretary of Defense has announced that the United States will convene a panel to review annually the status of all detainees at Guantanamo.[18] Such status hearings exceed the requirements in article 5.

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enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war." *Ex Parte Quirin*, 317 U.S. at 37-38.

[17] Casey, *Unlawful Belligerency*.

[18] *See* www.cbsnews.com/stories/2003/11/30/terror/main586001.shtml.

C. Taliban Forces Also Fail to Fulfill Each of the Four Requirements of Lawful Belligerency and Are, Therefore, Unlawful Combatants Not Protected by the Geneva Convention Relative to the Treatment of Prisoners of War.

Members of the Taliban also fail to fulfill the Hague requirements, each of which implicitly applies to the regular armed forces of a Party. To meet the first requirement, there must be a responsible command structure "capable of ensuring that the entire military organization complies with *jus in bello* strictures ****"[19] The Taliban appears to have had a vague, constantly changing cast of commanders with no clear lines of authority.[20] Hence, the first requirement is not met. The second requirement is that the group must wear some distinctive sign visible at a distance. The primary purpose of such a sign is to "permit[] opposing forces to identify other belligerents as lawful targets on the battlefield" and to avoid civilian casualties.[21] Taliban forces also failed to comply with this requirement. The third requirement is to carry arms openly. This requirement was probably the only requirement that was at least minimally met. The final requirement was to subscribe to and operate "in accordance with[] the laws and customs of war."[22] This the Taliban clearly failed to meet. Taliban leader Mullah Omar was quoted as saying: "'We do not accept something which somebody imposes on us under the name of human rights which is contradictory to the holy Quranic law.'"[23] Moreover, there are numerous reports that Taliban forces routinely targeted civilian populations, killed

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* (quoting *Women in Afghanistan: Pawns in Men's Power Struggles*, www.amnesty.org.)

and beheaded prisoners of war, treated women as spoils of war, wantonly destroyed civilian property, and the like.[24] As such, Taliban forces also fail to meet the strict requirements of lawful belligerency which would entitle them to the protections of the GPW.

* * *

Since neither the *al-Qaeda* nor the Taliban detainees meet the requirements of lawful belligerency under the 1949 Geneva Conventions, they are not POWs as defined in the GPW. Instead, as unlawful combatants, they fall outside of the protections enjoyed by POWs. Yet, assuming *arguendo* that *al-Qaeda* and Taliban members did fall within the protections of the GPW, nothing in that Convention permits an enemy combatant captured and detained pursuant to an ongoing war to challenge the legality of his detention in the courts of the Detaining Power during wartime.[25] Instead, the detainee's interests are expected to be represented, and his problems resolved, either by political representatives of the detainee's home country or by a neutral third party. And such efforts are, in fact, taking place with respect to the detainees in this matter. *See, e.g., Al-Joaid* Brf at 1-2, 5 (admitting that Saudi Arabia is seeking repatriation of its nationals); Dep't of Defense News Release No. 540-03 (July 23, 2003) (announcing meetings between Australian and United States officials regarding trial procedures to be used when trying

[24] *Id.* (and sources cited).

[25] Also, GPW art. 129 "expressly calls for implementing legislation. It is a well-established rule of treaty interpretation that a provision requiring parties to enforce treaty provisions through domestic legislation evidences an intent that the provision not be self-executing." Michael A. McKenzie, *Recent Development: Treaty Enforcement in U.S. Courts*, 34 Harv. Int'l L.J. 596, 604 (Spring 1993); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3) (stating that provisions of non-self-executing treaties do not create an individual right to action absent domestic implementing legislation).

Australian detainees); Dep't of State Int'l Information Programs (July 15, 2003) (quoting Ruth Wedgwood, *Justice Will Be Done at Guantanamo* (discussing meetings between U.S. and UK officials regarding UK nationals detained at Guantanamo)).

III. PETITIONERS' DETENTION IS NEITHER ARBITRARY NOR UNLAWFUL UNDER THE LAWS OF THE UNITED STATES OR INTERNATIONAL LAW.

Because Petitioners believe that the war on terrorism is more akin to the "war on drugs" than to armed hostilities, their arguments reflect an emphasis on rights conferred upon the accused in the criminal justice system. Petitioners speak of certain rights to which they believe they are entitled, all of which describe an accused's rights in the criminal justice system. Yet the law of war governs detainees in this matter.[26]

[26] *See* Kenneth Anderson, *The Military Tribunal Order: What to do with Bin Laden and al-Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 Harv. J.L. & Pub. Pol'y 591, 610-11 (Spring 2002)

> (The ability to prosecute domestic crime, and the necessity of pro viding constitutional standards of due process, including the extraordinarily complex rules of evidence, suppression of evidence, right to counsel, and the rights against self-incrimination have developed *within* a particular political community, and fundamentally reflect decisions about rights within a fundamentally domestic, democratic setting in which all of us have a stake ****
>
> It is a system, in other words, that fundamentally treats crime as a *deviation from* the domestic legal order, not fundamentally an *attack upon* the very basis of that order. Terrorists who come from outside this society, including those who take up residence inside this society for the purpose of destroying it, cannot be assimilated into the structure of the ordinary criminal trial. *** U.S. district courts are, by constitutional design, for criminals and not for those who are at once criminals *and* enemies. U.S. district courts are eminently

A. Enemy Combatants Captured in War Are Not Subject to Indefinite Detention.

Petitioners complain that no set date for their release has been established, *i.e.*, that they are being detained indefinitely. *E.g.*, *Rasul* Brf at 4 n.3; *Al Odah* Brf at 14. Yet, these Petitioners are not being held "indefinitely" any more than men taken prisoner at the beginning of World Wars I and II, the Korean War, and the Vietnam War were held indefinitely upon their capture. At the beginning of any war, it is impossible to know with any certainty when the war will end and the captives will be set free. Merely because the end of the war is not currently in sight and the end may not occur for years is no legitimate basis to claim that Petitioners are being held indefinitely in violation of their rights. Petitioners are being detained to ensure that they do not rejoin the fight. When the war ends and the fighting is over, however, captives must be either repatriated or tried for violations of the laws of war. GPW art. 118.[27] The *Rasul* Petitioners even quote the prison commander at Guantanamo as confirming that the prison there would be used "'as long as the global war on terrorism is ongoing,'" *see Rasul* Brf at 5 n.4 (quoting Charles Savage, *Growth at Base Shows Firm Stand on*

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unsuited by practicality but also by concept for the task of addressing those who planned and executed September 11. (emphasis in original)).

Id.

[27] GPW art. 118 reads, in pertinent part: "Prisoners of war shall be released and repatriated without delay *after the cessation of active hostilities* ****" (emphasis added). Yet, as with the Nuremberg Trials following World War II, nothing prevents trying captives for war crimes or crimes against humanity. 18 U.S.C. § 2441 defines war crimes under the laws of the United States, including "grave breaches" of the 1949 Geneva Conventions. The Nuremberg Charter defines "crimes against humanity" to include "murder *** and other inhumane acts committed against any civilian population, before or during the war ****" Nuremberg Charter, art. 6.c.

Military Detention, Miami Herald, Aug. 24, 2003, at A1), thereby confirming that Petitioners' detention is bounded by the duration of the war on terrorism, a duration for Petitioners' detention which comports fully with the provisions of the Geneva Conventions. GPW art. 118 (concerning release and repatriation). Thus, Petitioners' complaint about indefinite detention is baseless and should be rejected.

B. Enemy Combatants Captured in War Need Not Be Charged To Be Detained.

Petitioners complain that they have not been informed of the charges, if any, against them. *E.g.*, *Rasul* Brf at 2, 4, 9; *Al Odah* Brf at 4. Captives in wartime are detained in preventive, not punitive, detention. They are detained as a consequence of their belligerency and capture, not because they have committed some criminal offense for which they should be tried.

> [T]he capture and detention of enemy combatants is not a criminal proceeding. The purpose of their detention (including the detention of unlawful combatants) is not to punish, nor is it to otherwise stigmatize the individual. The detention of enemy combatants is solely to ensure that they do not rejoin the fight, or continue to support the opponent's war effort.[28]

This is not to say that unlawful combatants have not committed offenses against the law of war for which they *may* be tried. Should detainees be charged for some offense, they are informed *at that time* of the charges against them. Moreover, pursuant to Military Commission Order No. 1, *see* Dep't of Defense Military Commission Order No. 1 (March 21, 2002), detainees who are charged under the Order are

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[28] David B. Rivkin, Jr., et al., *Enemy Combatant Determinations and Judicial Review*, The Federalist Society for Law and Public Policy Studies ("Rivkin, *Enemy Combatant*"), at 8.

given access to counsel and the ability to present a defense before an impartial tribunal. Unless and until charges are filed, detainees—whether POWs or unlawful combatants—are not entitled to the procedures set forth in the Military Commission Order, and Petitioners' complaints about not being informed of the charges against them are without foundation and should be rejected.

C. Enemy Combatants Captured in War Have No Right to Counsel As A Result of Their Capture and Detention.

Petitioners complain that they have been denied access to counsel. *E.g.*, *Rasul* Brf at 2, 9; *Al Odah* Brf at 4, 8, 14. Once again, since Petitioners' detention is preventive, not punitive, there is no need for counsel. Should the President determine that a detainee is to be tried before a military commission for violating the law of war, that detainee will be given access to counsel. *See* Dep't of Defense Military Commission Order No. 1 (March 21, 2002). Absent the bringing of criminal charges, however, detainees have no right to counsel, and Petitioners' arguments to the contrary should be rejected.

D. Persons From Otherwise Friendly Nations Who Take Up Arms Against the United States Make Themselves Enemy Aliens of the United States.

Petitioners argue that, since they are nationals of nations friendly to the United States, they cannot be enemy aliens. *E.g.*, *Rasul* Brf at 9, 22, 38; *Al Odah* Brf at 9, 26. This argument stretches credulity to the limit. Citizens of other lands who take up arms against the United States make themselves enemies of the United States, irrespective of the state of relations between the United States and the enemy combatant's respective homeland. The nationality of the captured enemy combatant is irrelevant. This Court has even noted that U.S. citizens can be enemy combatants against the United States. *See Ex Parte Quirin*, 317 U.S. at 37. Hence, it

is the conduct of the national of the friendly nation that makes him an enemy alien to the United States, and the mere fact that he is a national of a friendly nation will not save him from the consequences of his belligerent conduct. Petitioners' argument is wrong on this point and should be rejected.

E. International Law Does Not Require the United States to Permit Guantanamo Detainees Access to Its Domestic Courts to Challenge the Legality of Their Detention.

Petitioners argue that they have the right to challenge the legality of their detention by writ of habeas corpus based on, *inter alia*, article 5 of the GPW and articles 9(1) and 9(4) of the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. *E.g.*, *Rasul* Brf at 2, 25 n.28; *Al Odah* Brf at 38-39. Neither argument is valid.[29]

1. *Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War does not require the United States to grant Petitioners a hearing to challenge their detention.*

Petitioners are wrong regarding the sweep and purpose of article 5 of the GPW. Article 5 reads as follows:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their release and repatriation. Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the

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[29] In their brief, the UK Members of Parliament also cite the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, as a basis to require constitutional due process for the Guantanamo detainees. MP Brf at 16 n.74. Yet, the United States is not a party to the 1977 Additional Protocols and is, therefore, not bound by their terms.

> categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

GPW art. 5. Article 5 only applies to those meeting the criteria set forth in article 4 of the GPW. *See* discussion *supra* at section II. B. & C., showing that *al-Qaeda* and Taliban members are unlawful combatants not covered by the GPW. The purpose of article 5 is not to require a judicial process through which a captive can challenge his status as an enemy combatant—as Petitioners are seeking to do in this matter—since enemy belligerency is assumed in article 5: "Article 5 *assumes* that the individual is an enemy combatant, having 'committed a belligerent act and having fallen into the hands of the enemy.'"[30] Further, the ICRC Commentary on article 5 limits its application to "deserters" and to those "who accompany the armed forces and have lost their identity card."[31] As such, article 5 is to be narrowly, not broadly, interpreted. Moreover, under the 1949 Conventions, detainees have no private right of action to challenge the legality of their detention.[32]

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[30] Rivkin, *Enemy Combatant*, at 9 (quoting GPW art. 5) (emphasis added).

[31] ICRC Commentary on GPW art. 5; *see also* note 34, *infra* (confirming the creation of a panel to review annually the status of all detainees).

[32] GPW art. 129 "expressly calls for implementing legislation. It is a well-established rule of treaty interpretation that a provision requiring parties to enforce treaty provisions through domestic legislation evidences an intent that the provision not be self-executing." Michael A. McKenzie, *Recent Development: Treaty Enforcement in U.S. Courts*, 34 Harv. Int'l L.J. 596, 604 (Spring 1993); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3) (stating that provisions of non-self-executing treaties do not create an individual right to action absent domestic implementing legislation).

2. *The International Covenant on Civil and Political Rights does not require the United States to grant Petitioners a hearing to challenge their detention.*

Petitioners cite articles 9(1) and 9(4) of the ICCPR as requiring the United States to permit Petitioners to challenge the legality of their detention in U.S. courts. *E.g.*, *Rasul* Brf at 25 n.28. Although the United States is a signatory to the ICCPR, its ratification document clearly stated that the United States considered articles 1 through 27, inclusive, to be non-self-executing. *See* U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4783, S4784 (daily ed. Apr. 2, 1992). As such, Petitioners must show that the Congress has enacted specific legislation to make the terms of those articles applicable under the laws of the United States. Petitioners have not met this burden. Further, the ICCPR was never intended to supplant the law of war and to impose criminal justice rules and procedures during wartime. To argue otherwise would turn the law of war on its head. Since detention of enemy combatants results directly from the fact of their armed belligerency and since its purpose is solely to ensure that the captives do not rejoin the fight, the provisions of the ICCPR do not apply to war situations involving captured enemy combatants. As such, the ICCPR does not entitle Petitioners to a hearing in United States courts.

* * *

Even recourse to the Great Writ is different during times of war. In their amicus brief discussing the history and reach of the Great Writ within the nations and traditions of the British Commonwealth, the Commonwealth Lawyers Association admits that the Great Writ is not available to "enemy aliens" or "prisoners of war" "to whom different considerations apply." Commonwealth Brf at 9 n.19. The Commonwealth

Lawyers also note that the GPW provides its own remedies. *Id.* at 3 n.8. Nowhere in the GPW is there any private right of action for those who wish to challenge the legality of their detention. In any event, once again, the reach of the Great Writ is conditioned by whether one is concerned with detention under the criminal justice system (which is not the case with the Guantanamo detainees) or detention pursuant to ongoing hostilities and the law of war (which fully characterizes detention at Guantanamo). And it is not the Department of Justice that bears responsibility for the Guantanamo detainees, but rather the Department of Defense. *See Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (this Court has "characterized as 'well-established' the power of the military to exercise jurisdiction over *** enemy belligerents, prisoners of war, or others charged with violating the laws of war"). This comports fully with the terms of the GPW. *See* GPW art. 39 (requiring that captured enemy combatants be detained in camps "under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power").

F. The United States Does Not Wish To Detain the Innocent At Guantanamo.

Petitioners also allege that innocent victims are intentionally being detained at Guantanamo without any recourse to challenge their detention. *E.g.*, *Rasul* Brf at 47, 49; *Al Odah* Brf at 3 n.3, 10, 12, 39. From this premise, Petitioners then argue that they must have access to United States domestic courts to remedy this alleged wrong. Yet, the GPW does not permit a detainee to challenge the legality of his detention in the courts of the detaining power during wartime. Further, as this Court observed in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974): "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a

reason to find standing." *Id.* at 227. The same applies here. Furthermore, there is ample evidence that United States military authorities are identifying those who should no longer be detained and are releasing such persons. *E.g.*, *Rasul* Brf at 6, 11 n.7; *Al Odah* Brf at 49 & n.107; *see also* DOD News Release No. 882-03 (Nov. 24, 2003) (announcing the release of 20 detainees on November 21). This, in itself, indicates that there is, in fact, a process for screening detainees in an attempt to separate those erroneously detained from those legitimately detained. Petitioners seem to imply that the United States Government is detaining the innocent for some sinister reason. Yet,

> [l]eaving aside the dark mutterings of conspiracy theorists, *** no one has yet to provide a plausible reason why the United States would intentionally hold dozens, or hundreds, of men that it knows are not *al-Qaeda* or Taliban members—feeding, clothing and sheltering them at the taxpayers' expense. *** The purpose of detention is twofold: to remove captives from active service and to obtain information regarding future attacks. Seizing civilians achieves neither goal and wastes scarce resources. Accordingly, the United States has every incentive to identify accurately enemy combatants.[33]

As Petitioners' own briefs attest, *see*, *e.g.*, *Rasul* Brf at 6, 11 n.7; *Al Odah* Brf at 49 & n.107, Guantanamo detainees are, in fact, being released.[34] Hence, Petitioners' allegations that the innocent are being unlawfully detained are simply wrong and should be rejected.[35]

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[33] David A. Rivkin, Jr., *The Law and War*, part 4, Wash. Times (Jan. 29, 2004), at A23.

[34] Secretary Rumsfeld has announced the creation of a panel to review annually the status of all Guantanamo detainees. *See* note 18, *supra*.

[35] *See also* www.csmonitor.com/2002/0404/p01s03-uspo.html ("*Al-Qaeda* operatives use multiple aliases to obscure their true identities.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

JEAN PAILLOT
EUROPEAN CENTRE FOR
LAW & JUSTICE
4 Quai Koch
67000 Strasbourg, France
33 88249440

ANATOLY PCHELINTSEV
VLADIMIR RYAKHOVSKY
SLAVIC CENTRE FOR
LAW & JUSTICE
Leninski Pr. 20, Entr. 5
Moscow, 117071 Russia
(095) 795-3979

JAY ALAN SEKULOW
Counsel of Record
THOMAS P. MONAGHAN
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON, SR.
JOEL H. THORNTON
ROBERT W. ASH
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Ave., NE
Washington, DC 20002
(202) 546-8890

Attorneys for Amici Curiae

March 3, 2004

They're known to carefully compartmentalize information **** [T]hey are likely to have 'a whole memorized agenda' of 'useless information' for deceiving interrogators ****"). This, of course, lengthens considerably the process of identifying which detainees should be released.

SUPREME COURT, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

(38) (37)

Nos. 03-334; 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF FORMER ATTORNEYS GENERAL OF THE UNITED STATES, FORMER DIRECTOR OF THE CIA, RETIRED MILITARY OFFICERS AND MEDAL OF HONOR WINNERS AND FORMER ASSISTANT ATTORNEY GENERAL IN SUPPORT OF RESPONDENTS

ANDREW G. MCBRIDE
Counsel of Record
KATHRYN L. COMERFORD
WILEY REIN & FIELDING LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000

Attorneys for Amici Curiae

186112

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INTEREST OF AMICI CURIAE[1]

Amici the Honorable William P. Barr, the Honorable Edwin Meese III, and the Honorable Richard Thornburgh are former Attorneys General of the United States.

Amicus the Honorable R. James Woolsey is former Director of Central Intelligence, former Ambassador to the Negotiation on the Conventional Armed Forces in Europe, and former Under Secretary of the Navy.

Amicus the Honorable Charles J. Cooper is former Assistant Attorney General for the Office of Legal Counsel.

Amicus General P.X. Kelley, USMC (Ret.) was Commandant of the Marine Corps and a Member of the Joint Chiefs of Staff from 1983 to 1987. He served two command tours in the Republic of Viet Nam.

Amicus Lieutenant General Nicolas B. Kehoe, USAF (Ret.) served 34 years in the Air Force, including high-level international security positions within our military and the North Atlantic Treaty Organization. He began his military career as a fighter pilot and flight instructor.

Amicus Major General Patrick H. Brady, USA (Ret.) served over 34 years in the Army, including two tours in the Republic of Viet Nam, during which he flew over 2000 combat missions, rescuing over 5000 wounded and earning the Medal of Honor, the Distinguished Service Cross, six Distinguished Flying Crosses, and the Purple Heart.

Amicus Major General James E. Livingston, USMC (Ret.) served over 33 years in the Marine Corps, including three tours in the Republic of Viet Nam. He has received the Medal of

1. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that counsel for *amici* authored this brief in its entirety. No person or entity other than *amici curiae* and their counsel made any monetary contribution to the preparation of this brief. Letters of consent to the filing of this brief from all parties to these consolidated cases have been filed with the Clerk of the Court.

Honor, the Distinguished Service Medal, Silver Star, Bronze Star, and the Purple Heart.

Amicus Colonel Jack Jacobs, USA (Ret.) served 21 years in the Army, including two tours in the Republic of Viet Nam. He has received the Medal of Honor, two Silver Stars, and three Bronze Stars.

Amici share the belief that judgments regarding the use of military power during an ongoing armed conflict are constitutionally committed to the President as Commander-in-Chief. *Amici* believe that the imposition of procedural and substantive constraints upon that power, akin to those that exist in the context of domestic criminal or civil proceedings, is both constitutionally unjustified and unwise. Such a result would embroil the federal courts in military, strategic, and political judgments, disrupt the unitary control and accountability the Framers provided for in the designation of one Commander-in-Chief, and place unprecedented and dangerous restrictions on our soldiers in the field of battle. *Amici* respectfully submit that the decision to detain a foreign national captured on the field of battle in order to prevent harm to our troops, to our military mission, or to our homeland, is a political question that cannot be reviewed by the federal courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Both sets of petitioners in these cases attempt to frame the question before the Court as whether there exists any exception to a presumption in favor of judicial review of executive action. They would have the Court assume that both the writ of habeas corpus and the underlying constitutional guarantees it is designed to enforce apply to them, and then search for a statutory withdrawal or abridgment of that jurisdiction.[2] The Rasul

2. *See, e.g.*, Petitioners' Brief on the Merits at 14, *Rasul* v. *Bush*, No. 03-334 (U.S. Jan. 22, 2004) ("Rasul Br.") ("[T]he present case involves no remotely perceptible attempt by Congress to *abridge* jurisdiction." (emphasis added)); *id.* at 29-30 (noting the "absence of any Congressional indication that federal courts should be stripped of (Cont'd)

petitioners even argue that a finding of a lack of habeas jurisdiction in these cases would present serious constitutional questions under the Suspension Clause.[3]

Petitioners put the cart before the horse. Judicial review has never been held to be coextensive with every power that can be exercised by the political branches. Indeed, the very case that instituted judicial review also recognized that some judgments "are by the constitution and laws, submitted to the executive [and] can never be made in this court." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). In the context of the political branches' conduct of our external relations, and in particular in the exercise of the war powers, it is more accurate to say that there is a strong presumption *against* judicial review. "[T]he conduct of foreign relations [and] the war power are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89 (1952); *see also, e.g.*, *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

The fundamental error that runs through all of petitioners' arguments is the attempt to conflate the Commander-in-Chief's exercise of military power against an armed foreign enemy with the exercise of domestic law enforcement authority. These are two very distinct constitutional realms and the differences between them bear directly on the availability of judicial review. *See, e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936). In the domestic realm of law enforcement, the government's role is disciplinary—sanctioning an errant member of society for transgressing the internal rules of the body politic. The Framers recognized that in the name of

(Cont'd)
their habeas jurisdiction"); Brief for Petitioners at 6-9, 8-23, *Al Odah* v. *United States*, No. 03-343 (U.S. Jan. 14, 2004) ("Al Odah Br.") (same).

3. *See* Rasul Br. at 21-23.

maintaining domestic tranquility an overzealous government could oppress the very body politic it is meant to protect.

Thus our Constitution makes the fundamental decision to sacrifice efficiency in the realm of law enforcement by guaranteeing that no punishment can be meted out in the absence of virtual certainty of individual guilt. Both the original Constitution and the Bill of Rights contain a number of specific constraints on the Executive's law enforcement powers, many of which expressly provide for a judicial role as a neutral arbiter or "check" on executive power. In this realm, the Executive's subjective judgments are irrelevant; it must gather and present objective evidence of guilt satisfying specific constitutional standards at each stage of a criminal proceeding. The underlying premise in this realm is that it is better for society to suffer the cost of the guilty going free than mistakenly to deprive an innocent person of life or liberty.

The situation is entirely different in armed conflict where the entire nation faces an external threat. In armed conflict, the body politic is not using its domestic disciplinary powers to sanction an errant member, rather it is exercising its *national defense powers* to neutralize the external threat and preserve the very foundation of all our civil liberties. Here the Constitution is not concerned with handicapping the government to preserve other values. Rather it is designed to maximize the government's efficiency to achieve victory—even at the cost of "collateral damage" that would be unacceptable in the domestic realm.

For this reason, the Constitution places exclusive authority to command military operations in the unitary Executive. In this realm, the President and his military subordinates must be free to act upon their subjective judgments as to where to attack, what level of force to apply, and who poses a danger to the success of the military mission. In this realm, the ideas that the President may take coercive action against persons or property only when he possesses a certain quantum of individualized evidence or that the judiciary should act as a "check" on his judgment as to the proper military course are absurd. *See United*

States v. *Verdugo-Urquidez*, 494 U.S. 259, 273-75 (1990). They would assign to our Framers an unspoken intent to place the United States at a distinct and unprecedented disadvantage in military conflict. *See Johnson* v. *Eisentrager*, 339 U.S. 763, 779 (1950).

In these cases, there is no doubt that the President is exercising his military powers as Commander-in-Chief. The United States has been confronted by a series of unprovoked attacks on military and civilian targets, culminating in the devastating attacks of September 11, 2001. It is well settled that even in the absence of congressional action, Article II fully empowers, indeed obligates, the President to respond with appropriate force to meet and defeat such threats. Here, in addition, Congress specifically authorized the President to use military force against "those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (emphasis added). Thus, exercising these combined powers under the Constitution, the President launched military action against al Qaida and the Taliban regime in Afghanistan.

Petitioners in these cases were captured by United States or allied military forces in the context of active military operations on the field of battle. They are all foreign nationals who have alleged no connection to the United States other than their capture and detention by our military forces. They are held not as punishment or a prelude to civilian criminal prosecution. Rather, after careful review through the military chain of command, while hostilities remain ongoing, the Executive Branch has made the judgment that their freedom or release would pose an unacceptable risk to our continuing military efforts.

Amici respectfully submit that the claims of these petitioners are beyond the jurisdiction of this or any federal court because they raise political questions. *See, e.g., Gilligan* v. *Morgan*,

413 U.S. 1, 8-9 (1973); *Baker* v. *Carr*, 369 U.S. 186, 216-17 (1962). The judgments at issue here are textually committed by the Constitution to the President as Commander-in-Chief and are quintessentially executive in nature. Because none of the constitutional rights applicable in the criminal context extends to foreign nationals captured on the field of battle, there are no judicially discoverable standards to apply. Nor can the President's military and political judgments regarding the conduct of a live conflict be reduced to any judicially manageable test or set of factors. The writ of habeas corpus has never been available to foreign nationals held as enemy combatants and its expansion here would produce the extraordinary consequence of setting the judiciary against the will of both political branches during ongoing hostilities. Finally, the imposition of judicially created standards or judicial review would fundamentally alter the combat mission of our troops from suppression of the enemy to the collection of evidence. It would cause lasting harm to our military's effectiveness and our ability to gather intelligence. For all these reasons, this Court should find that petitioners' claims are nonjusticiable and affirm the judgment below on that ground.[4]

ARGUMENT

I. The Judgments at Issue Here Are Textually Committed to the President as Commander-in Chief and Quintessentially Executive in Nature.

The Constitution designates the President "Commander in Chief of the Army and Navy of the United States." U.S. CONST. art. II, § 2. Once hostilities have begun the President is solely

4. *Amici* note that the United States argued that petitioners' actions were barred by the political question doctrine in the courts below and in its opposition to certiorari in this Court. Brief for Appellees at 32-34 & n.12, *Al Odah* v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003) (Nos. 02-5251, *et al.*); Brief for Respondents in Opposition at 20 n.8, *Rasul* v. *United States*, Nos. 03-334 & 03-343 (U.S. Oct. 3, 2003). The political question doctrine thus provides an alternative ground upon which this Court can affirm the judgment below. *See, e.g.*, *Harris Trust & Savings Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000).

responsible for determining the methods of waging war. At the very core of the President's power as "Commander-in-Chief" is the exclusive authority to direct how, and against whom, military power is to be applied to achieve the military and political objectives of the campaign.[5]

The Framers made a conscious decision to place all authority regarding the actual conduct of armed conflict in the hands of the unitary Executive. As Alexander Hamilton noted in The Federalist No. 74, even those few state governments that entrusted the executive power to a multimember council, nonetheless placed the power to wield military power in the hands of a single person. He went on to say:

> Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.

THE FEDERALIST NO. 74, at 447 (Clinton Rossiter ed., 1961).

Notably absent from the constitutional clauses dealing with war powers is any mention of the courts. The Constitution's failure to confer on the judiciary any responsibility in the area of military operations contrasts sharply with the provisions applicable to criminal proceedings, where courts are afforded a

5. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1, 26 (1942) (recognizing that the Constitution "invests the President as Commander in Chief with the power to wage war which Congress has declared"); *Hamilton* v. *Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (emphasizing that the President "is constitutionally invested with the entire charge of hostile operations"); *see also DaCosta* v. *Laird*, 471 F.2d 1146, 1154 (2d Cir. 1973) (affirming that the Constitution contains a "specific textual commitment of decision-making responsibility in the area of military operations in a theatre of war to the President, in his capacity as Commander in Chief").

significant—indeed the primary—role in preserving individual liberties against legislative and executive overreaching. The Constitution contemplates, for example, that the judiciary will try criminal cases involving treason against the United States, U.S. CONST. art. III, § 3; that courts will oversee the issuance of search warrants, *id.* amend. IV; that grand juries will issue criminal indictments, *id.* amend. V; and that courts will afford criminal defendants "a speedy and public trial," *id.* amend. VI.

This interposition of judicial power between the Executive's law enforcement authority and members of the body politic stands in contrast to the complete absence of any judicial role in the exercise of military powers. Indeed, the idea that the federal judiciary should protect foreign nationals in the field of battle against the exercise of the military power of the United States is, as this Court noted in *Eisentrager*, an exceedingly novel one. 339 U.S. at 784. The concept of the judiciary as a "check" on an overzealous Executive in the context of domestic civil liberties makes sense. But such a "check" in the context of the exercise of the war powers against foreign dangers makes no sense at all. It would override the Framers' choice of unitary control and efficiency and place the judiciary in the position of according constitutional protections, not to members of the body politic, but to those who aim to destroy both the body politic and those very protections. *Id.* at 779; *Minotto* v. *Bradley*, 252 F. 600, 602 (N.D. Ill. 1918) (noting that the courts are not neutral in war but are allied with the sovereign against its enemies).

The lack of a judicial role in this area has been recognized since the earliest days of the Republic. In 1793, a federal district court declined to pass on a libel in admiralty because the case involved an offense to the territorial sovereignty of the United States by warring factions. The court reasoned that the response to this dispute was committed to the political branches and beyond the judicial power:

> Their power is confined to matters of internal police; externally they have no power: they have none of the powers of peace or war. They have no right to command the forces of the country; and these are the means after negociation fails, by which sovereigns decide their disputes. The courts of England, though they decide freely on all matters of internal police, will not meddle with these rights of the sovereign. They will not even grant a habeas corpus in the case of a prisoner of war, because the decision on this question is in another place, being part of the rights of sovereignty. Although our judiciary is somewhat differently arranged, I see not, in this respect, that they should not be equally cautious.

Moxon v. *The Fanny*, 17 F. Cas. (2 Pet. Adm.) 942, 947 (D. Pa. 1793).

By its very nature, the designation "Commander-in-Chief" recognizes no superior authority in the chain of military command. In armed conflict, that grant must include plenary authority to direct military force against persons or property the commander perceives as a threat to the safety of our forces, the safety of our homeland, or the ultimate military and political objectives of the war. The President may act not only to destroy hostile forces, but to deny them military advantage or to secure advantage for our forces. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863). Thus he may expand the geographic theatre of war, destroy civilian property that could aid the enemy or endanger our forces, seize useful sources of intelligence information, and detain persons found in the field of battle he deems a threat to the success of the military mission. *See, e.g.*, *New Orleans* v. *Steamship Co.*, 87 U.S. (20 Wall.) 387, 394 (1874) (recognizing the military's authority in time of war to "do anything necessary to strengthen itself and weaken the enemy"). The President's power to wage war "is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict." *In re Yamashita*, 327 U.S. 1, 12 (1946).

At the heart of any of these military decisions is the judgment of what constitutes a threat or potential threat and what level of coercive force should be employed to deal with these dangers. *See The Prize Cases*, 67 U.S. at 679 (recognizing that the President "must determine what degree of force the crisis demands"). In each case, the President, with the advice of his military commanders, must make prudential judgments based upon an assessment of whether a risk is presented. Even in cases where there is substantial uncertainty whether particular individuals pose a danger, the President must make a judgment whether prudence nevertheless dictates treating such persons as hostile in order to avoid an unacceptable risk to our military objectives.

By their nature, these military judgments must rest upon a broad range of information, opinion, prediction, and even surmise. The President's assessment may include reports from his military and diplomatic advisors, field commanders, intelligence sources, or the opinions of allied nations. He must decide what weight to give each of these sources. He must evaluate risks in light of the present state of the conflict and the overall military and political objectives of the campaign. The "very nature of executive decisions" in this area "is political, not judicial." *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Both sets of petitioners attempt to downplay any intrusion on the Executive's military powers by emphasizing that it has now been more than two years since their capture and that they are held "in a place far from the battlefield." Al Odah Br. at 12; Rasul Br. at 9. The Court should not be fooled. Neither their present location nor the fact that they have been held for two years changes the fact that petitioners seek judicial scrutiny of the basis for their detention, which inevitably involves the re-examination of decisions made on the battlefield itself during active hostilities. It also entails second-guessing the Executive's

judgment that their release *today* would pose an unacceptable risk in what is an ongoing conflict.[6]

II. Constitutional Rights Applicable to Criminal Prosecutions Do Not Apply to the Use of Military Power Against Foreign Nationals.

Throughout their briefs, petitioners use the language of the criminal law and rely upon principles developed in the context of criminal prosecution. Thus, petitioners argue that they are detained, "without charges, trial, access to counsel or the courts or process of any kind." Rasul Br. at 9. They claim they are "innocent of any wrongdoing," *id.*, and seek to require the Executive to establish an individualized factual predicate for their detention, as is required for pre-trial detainees. Al Odah Br. at 14 n.14.

They alternatively invoke the protections of the Fourth, Fifth, and Sixth Amendments. *See, e.g.*, Rasul Br. at 2 (right of grand jury indictment and right to counsel); *id.* at 17 n.18 (Fourth Amendment rights regarding seizure of the person (citing *Gerstein* v. *Pugh*, 420 U.S. 103 (1975)), and due process protections afforded to criminal defendants subject to pretrial detention (citing *United States* v. *Salerno*, 481 U.S. 739 (1987))).

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6. Petitioners are wrong when they suggest that this is a case where the President's actions are contrary to congressional will and that therefore the President's power is "at its lowest ebb." Rasul Br. at 14-15 & n.12; Al Odah Br. at 25 (both citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). In fact the opposite is true. In addition to the Joint Resolution authorizing the use of military force, Congress has continued to appropriate monies for the war effort, *see, e.g.*, Pub. L. No. 108-106, 117 Stat. 1209 (2003), as well as funds to construct new military facilities at Guantanamo Bay Naval Base. *See, e.g.*, Pub. L. No. 107-314, § 2201(b), 116 Stat. 2458, 2687 (2002). Thus, this is a case where the President's "authority is at its maximum," *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring), and if "Congress chooses not to confront the President, it is not [the courts'] task to do so." *Goldwater* v. *Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

The Al Odah petitioners would have this Court find rights to counsel, visitation rights, and "access to an impartial tribunal to review whether any basis exists for their continued imprisonment," Al Odah Br. at 4-8, in the Due Process Clause of the Fifth Amendment.

In laying claim to these rights, petitioners ignore two critical legal principles. First, petitioners are not being detained pursuant to the Executive's domestic authority to punish them for any past violations of the criminal law. Their detention as enemy combatants is a tool of war, utilized by the Commander-in-Chief and his military subordinates to advance an ongoing military operation by preventing petitioners from rejoining the conflict or otherwise undermining our military and strategic goals.

Second, petitioners have no "substantial connections with this country," *Verdugo-Urquidez*, 494 U.S. at 271, that would allow them to claim the protection of the Bill of Rights. They have never attempted voluntarily to place themselves in any relation with the domestic body politic, and their only connection to the United States is that they were confronted by American military forces on the field of battle. They had no constitutional rights on the field of battle itself, and their capture by our military did not vest them with any such rights. *See id.* at 275 (Kennedy, J. concurring) ("the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory").[7]

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7. By necessity, both sets of petitioners are decidedly vague about exactly what constitutional rights they claim to possess, and when they claim to have first acquired those rights. If capture and military detention are sufficient to confer such rights, petitioners must have enjoyed them during their military detention in Afghanistan. This would mean that prisoners of war presently held in Iraq enjoy the same constitutional protections. By contrast, if petitioners' position is that they only acquired constitutional rights when they were involuntarily transferred to

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One need look no further than the text of the Sixth Amendment to confirm that the Bill of Rights does not protect foreign nationals from the exercise of the military power in times of war. *See Eisentrager*, 339 U.S. at 782. The Sixth Amendment's opening clause, "[i]n all *criminal prosecutions*," U.S. CONST. amend. VI (emphasis added), limits its reach to the Executive's exercise of his domestic law enforcement authority. The rights enumerated thereafter confirm this limited application; the concepts of a speedy and public trial, an impartial jury drawn from "the State and district wherein the crime shall have been committed," and compulsory process, among others, *id.*, are impossible to apply in the context of foreign military actions. Thus, petitioners' rhetoric aside, nothing in the Constitution entitles them to a "trial" or anything like the adversarial proceeding described in the Sixth Amendment.

Similarly, the Fourth Amendment, by its terms, has no application to foreign nationals who can claim no connection to our body politic, and this Court has recognized that it cannot be applied to "foreign policy operations." *Verdugo-Urquidez*, 494 U.S. at 273. The Fourth Amendment provides, in part, that "[t]he right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV (emphasis added). As this Court has held, "the people" was "a term of art employed in select parts of the Constitution" that "refer[red] to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265. And, according to this Court, the "history of the drafting of the Fourth Amendment also suggests that its

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Guantanamo Bay, then their possession of those rights is entirely dependent on the executive decision to detain them there. Yet elsewhere petitioners argue that their constitutional rights and access to the courts *cannot* depend upon the Executive's decision to detain them in a particular location. *See, e.g.*, Al Odah Br. at 7-8 & n.7.

purpose was to restrict searches and seizures which might be conducted by the United States *in domestic matters*." *Id.* at 266 (emphasis added).

Indeed, as the Court explained in *Verdugo-Urquidez*, contemporaries of the Framers authorized the President, in an undeclared war with France, " 'to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas.' " *Id.* at 267 (citation omitted). Both United States naval forces and privateers acting by order of the President boarded and seized foreign ships without affording their crews any of the protections enumerated in the Fourth Amendment. "[B]ut it was never suggested that the Fourth Amendment restrained the authority of congress or of United States agents to conduct operations such as this." *Id.* at 268.

This Court has also rejected the notion that the protections of the Fifth Amendment apply to foreign persons outside the territory of the United States. Its "rejection of extraterritorial application of the Fifth Amendment was emphatic," *id.* at 269:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Eisentrager, 339 U.S. at 784; *see also Quirin*, 317 U.S. at 40-41. The *Eisentrager* Court further relied on the text of the Fifth Amendment to confirm its limited application. As the Court explained, any reading of the Fifth Amendment that would give foreign nationals more rights than those afforded to American citizen soldiers and sailors "in actual service in time of War,"

is simply absurd. 339 U.S. at 782-83 ("It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies.").[8]

Finally, as a logical matter, if any of these protections traditionally applicable in American criminal cases were read to apply to enemy combatants held pursuant to military authority during active hostilities, there is no reason why other constitutional rights would not also be so extended. *See id.* at 784. This Court has exposed the idea that battlefield combatants are entitled to the full panoply of constitutional protections as a frivolous one. *See id.* at 784-85. There is no principled basis upon which the Court can accord these petitioners certain constitutional rights and not others. And if they possess those rights at Guantanamo Bay, there is no principled basis to deny them those rights at any other stage of their capture of confinement.

III. There Are No Judicially Manageable Standards To Apply to Military Judgments Made During an Ongoing Conflict.

Both sets of petitioners claim a right to some form of adversarial process by which they may challenge their military

8. Even if the Due Process Clause did apply to these petitioners, it is clear that they have received all the process that they are due in the context of military detention. "Of the roughly 10,000 people that were originally detained in Afghanistan, fewer than ten percent were brought to Guantanamo Bay in the first place. The vast majority were processed in Afghanistan and released in Afghanistan." Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce (Feb. 13, 2004) <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html>. In addition, the Executive has undertaken a comprehensive, multi-layered, and ongoing review of the proper classification of each prisoner at Guantanamo Bay. *Id.* What petitioners seek is an "impartial tribunal" and some form of adversarial process either supervised by or conducted by a civilian court. That process is incompatible with the decision being made—in meeting and defeating attacks on the United States, the President's duty as Commander-in-Chief is not to be "neutral and detached," but rather to place the security of our nation and our military forces above the interests of the enemy or even those suspected of being the enemy.

detention, either in a federal court or in an "impartial tribunal" ordered by a federal court. These claims depend upon the proposition that the Commander-in-Chief is required to meet some evidentiary standard, some predicate threshold, before he may use the coercive power of the United States military against a particular individual in the field of battle. An essential corollary to this proposition is that the federal courts are capable of devising and applying procedural rules and substantive standards to constrain the President's discretion in this area.

Neither the proposition nor its corollary can withstand scrutiny. The conduct of war cannot be reduced to an individualized balancing of rights against interests. The military cannot be required to develop an evidentiary predicate before attacking a particular position, using a particular weapon, or detaining and holding persons found in the field of battle. By its nature, war causes collateral damage every day that would be a *per se* violation of the Due Process Clause in the domestic setting. *See, e.g.*, *United States* v. *Caltex (Phillipines), Inc.*, 344 U.S. 149 (1953); *Juragua Iron Co.* v. *United States*, 212 U.S. 297 (1909).

Nor is a civilian court capable of developing judicially manageable standards to either govern or evaluate military judgments made during an ongoing conflict. A court cannot declare the Executive's judgment here "valid" or "invalid" the way it would a search warrant or an arrest in the domestic realm. Rather, it could only register disagreement as a policy matter with the balancing of competing interests by the primary decision maker, whose institutional competence and sources of information are vastly superior to that of the judiciary in this area. *Gilligan*, 413 U.S. at 10 ("it is difficult to conceive of an area of governmental activity in which the courts have less competence"); *Curtiss-Wright*, 299 U.S. at 320 (noting the superior sources of information available to the Executive Branch in the context of a foreign conflict).

Because none of the specific guarantees of the Fourth, Fifth, or Sixth Amendments applies, *see supra* Part II, none of the

well-established benchmarks for executive conduct in the area of domestic law enforcement can offer the federal courts any guide for evaluation of the military judgments at issue here. The Court would be called upon to invent substantive and procedural rules from whole cloth, with no guidance from the text or history of the Constitution. Petitioners' vague calls for an "impartial tribunal" and "legal process" leave unanswered a host of questions that the federal courts would be required to answer if this Court approves the exercise of jurisdiction over these cases. Who bears the burden of proof in these proceedings and what is the proper evidentiary standard (*e.g.*, reasonable suspicion, probable cause, preponderance of the evidence, or beyond a reasonable doubt)? What rights would prisoners of war enjoy in these impartial proceedings (*e.g.*, rights of compulsory process, to confront witnesses, to receive "exculpatory" evidence from the government)? Would the rules of evidence apply to exclude all hearsay, including intelligence information?

War is necessarily rife with uncertainties that cannot be reduced to a particular quantum of proof in a trial-like forum. Even a small risk that a person confronted on the battlefield is a threat may justify coercive military action—even lethal action—where the potential harm is great. In such circumstances, the Commander-in-Chief and his military subordinates may conclude that any mistake from *failure to act* would have such grave consequences that they must adopt a sweeping approach that exposes persons who may be "not guilty," in the sense that term is used in our criminal law, to coercive military force.[9]

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9. For example, suppose there is a chance that one of the petitioners in these cases is a trained nuclear scientist who is a member or sympathizer of al Qaida. The President has made a prudential judgment that this person must be detained for the safety of our troops and the homeland. By what standard will a federal court second guess that judgment or impose a legal and evidentiary framework according to which the judgment must be made? Moreover, unlike the President, a federal court is not politically accountable to the American people if its decision to order the release of such a detainee has tragic consequences.

It is for these reasons, that the federal courts have consistently declined to impose "legal process" on the President's decisions to use military force, including the Viet Nam War, *see, e.g.*, *Luftig* v. *McNamara*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); the bombing of Cambodia, *see, e.g.*, *Holtzman* v. *Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); the provision of military aid in El Salvador, *see, e.g.*, *Crockett* v. *Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); the provision of military aid in Nicaragua, *see, e.g.*, *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985); the deployment of armed forces to the Persian Gulf, *see, e.g.*, *Lowry* v. *Reagan*, 676 F. Supp. 333 (D.D.C. 1987); the removal from power of Panamanian General Manuel Noriega, *see, e.g.*, *Industria Panificadora, S.A.* v. *United States*, 763 F. Supp. 1154 (D.D.C. 1991), *aff'd*, 957 F.2d 886 (D.C. Cir.), *cert. denied*, 506 U.S. 908 (1992); and Operation Desert Storm, *see, e.g.*, *Ange* v. *Bush*, 752 F. Supp. 509 (D.D.C. 1990).

These precedents reflect the fundamental principles that decisions regarding the use of military power in response to external threats "should fall upon the shoulders of those elected by the people to make those decisions," *Ange*, 752 F. Supp. at 513, and that the judiciary is not institutionally capable of reviewing the myriad political and strategic considerations that underlie such decisions, *Gilligan*, 413 U.S. at 10-11.

Any attempt to arrive at such a set of standards for these cases in the present state of the conflict, based on a snapshot in time of the circumstances of an ongoing war, would risk placing the Commander-in-Chief in a legal straitjacket in responding to future developments that a court cannot possibly foresee. Even if a "court could *possibly* devise a manageable set of standards for answering the questions . . . , world politics today change so rapidly that it might, by setting forth rules, create a rigid matrix that would unnecessarily restrict the executive some time in the future when the powers denied today may be essential to the well-being of the United States then." *Atlee* v. *Laird*, 347 F.

Supp. 689, 707 (E.D. Pa. 1972) (emphasis added); *Holtzman*, 484 F.2d at 1311 (noting that the situation in Cambodia "fluctuates daily and we cannot ascertain at any fixed time either the military or diplomatic status").

These concerns are clearly present here. The war against both al Qaida and the Taliban is still active and over 8,000 American troops remain in the Afghanistan theatre in harm's way. Judicial restrictions on the military detention of persons captured in the field of battle could have a direct and deleterious effect on the military's ability to defeat the remaining Taliban and al Qaida elements, who continue to attack our troops and our allies in an attempt to destabilize the new government in Kabul.

Petitioners attempt to distance themselves from these precedents and the ongoing conflict by claiming that they "are not challenging any action taken in 'occupied territory' or on the field of battle." Al Odah Br. at 22 n.44. This cannot be accurate. As noted above, petitioners' claims that they are innocent of any wrongdoing and that they are not adherents of al Qaida or the Taliban *necessarily require a judicial inquiry into their conduct on the battlefield and their interaction with United States and allied military forces in the zone of battle*, as well as into the Executive's *continuing judgment* that their release would cause harm to the military mission. *See supra* pp. 10-11. Moreover, by their nature such judicial inquiries will establish standards that the Executive will be required to follow in future encounters with persons *on the field of battle*.

Nor could federal courts effectively *apply* any set of standards to the President's judgments in these cases. The exercise of jurisdiction over these petitioners' claims would require federal courts to intrude into the President's most sensitive sources of military and political intelligence. The Rasul petitioners would require the President to produce such information directly to a federal court in a habeas corpus proceeding. The Al Odah petitioners would require the Executive to conduct the equivalent of an on-the-record hearing under the

Administrative Procedure Act, presumably followed by judicial review.[10] As this Court has held, the judiciary has neither the constitutional warrant nor the institutional capacity to review decisions based upon intelligence sources and information that should remain within the Executive Branch:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidence.

Chicago & Southern Air Lines, 333 U.S. at 111; *Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *Totten* v. *United States*, 92 U.S. (2 Otto) 105, 106-07 (1875); *see also Holtzman*, 484 F.2d at 1310 ("We are not privy to the information supplied to the Executive by his professional military and diplomatic advisers and even if we were, we are incompetent to evaluate it.").

Finally, this is a case where the greater power must include the lesser, and neither is subject to judicial constraint. Petitioners make no claim that a military decision to use lethal force against them on the field of battle would be subject to judicial scrutiny. Yet they claim that because a lesser degree of military force

10. At one point in their brief, the Al Odah petitioners indicate that they seek only executive process and "do not contend that an Article III court must itself conduct that process and review the basis for each individual detention." Al Odah Br. at 47. Yet they devote a substantial portion of their brief to arguing that the judicial review provisions of the APA apply to their case and none of the military exceptions to judicial review is applicable. *Id.* at 21-23. Thus, at the end of the day, even the Al Odah petitioners would have the federal courts make the final decisions in this area, as they do when they sit in review of any administrative agency, under one of the standards specified in 5 U.S.C. § 706.

was used against them, a duty arose in the Executive to justify his actions in court. But as discussed above, the constitutional nature of both decisions is the same—a strategic and military judgment that is beyond the realm of judicial review. *See, e.g.*, *Ludecke* v. *Watkins*, 335 U.S. 160, 166 (1948) ("A war power not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that power exercised within narrower limits . . . .").

IV. The Writ of Habeas Corpus Has Never Been Extended To Aid Foreign Persons Found on the Battlefield and Detained as Enemy Combatants.

Far from supporting the petitioners' calls for judicial intervention, both the English and early American history of the writ of habeas corpus reveals that the writ was unavailable to prisoners of war or enemy combatants. For the English courts, enemy aliens and combatants simply had no rights against the Crown that could be enforced via the writ. The English courts also expressed concern that entertaining jurisdiction over the writ in such circumstances would constitute judicial interference with the exercise of sovereign powers that belonged to the Crown alone. These same concerns animate the early American cases, and along with the limitations implied in the Suspension Clause itself, they make clear that the writ does not extend to foreign nationals captured in the field of battle.

The history of the writ at English common law makes clear that it did not protect prisoners of war or enemy combatants. As traditionally understood, the writ was never available to "an alien enemy who is a prisoner of war." 9 *Halsbury's Laws of England* (*Halsbury*) pt. III, ¶ 1212, at 710-11 (2d ed. 1933) (the writ "will not be granted . . . to an alien enemy who is a prisoner of war"); *see Schaffenius* v. *Goldberg*, 1 K.B. 284, 305 (1916) (Ld. J. Warrington) ("The authorities that have been cited to us with regard to prisoners of war in old times only go to this, that the prisoner of war could not sue out a writ of habeas corpus. Of course nobody now disputes that."); *Moxon*, 17

F. Cas. at 947. When the "safety of the realm" was at issue, "and the Government thereupon intern[ed] . . . alien enem[ies], the action of the Executive in so doing [wa]s not open to review by the Courts by *habeas corpus*." *Halsbury*, ¶ 1202 note (c), at 703.

For those alien enemies who invaded the realm, it was equally clear that no resort could be had to the courts for issuance of the writ because the alien enemy invader had no rights at all. *See Sylvester's Case*, 7 Mod. 150 (K.B. 1703) ("If an alien enemy come into England without the queen's protection, he shall be seized and imprisoned by the law of England, and he shall have no advantage by the law of England, nor for any wrong done to him here."); *see also Rex* v. *Knockaloe Camp Commandant*, 87 L.J.K.B. 43, 46 (1917) (Avery, J.) ("There is clear authority that a person who is an alien enemy prisoner of war is not entitled to apply to the Court for a writ of *habeas corpus*.").

The fact of imprisonment in the King's realm did not alter the alien enemy prisoner of war's legal entitlement—he still could not obtain a writ of habeas corpus. *See, e.g., Rex* v. *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759) (denying the writ to a prisoner of war held captive in Liverpool); *Three Spanish Sailors*, 2 Black W. 1324, 96 Eng. Rep. 775 (K.B. 1779) (declaring that "alien enemies and prisoners of war [are] not entitled to any of the privileges of Englishmen; much less to be set at liberty on habeas corpus" and denying the writ to Spanish seaman brought as prisoners of war to England); *see also Furly* v. *Newnham*, 2 Doug. K.B. 419 (1780) ("The Court will not grant a habeas corpus ad testificandum to bring up a prisoner of war" in context where American prisoner of war was held at Plymouth.).

Nor did the enemy's claim that he was the national of a neutral nation, pressed into service by an enemy nation, captured by privateers, or misled as to his status help his cause. *Schiever*, 2 Burr. 765, 97 Eng. Rep. at 551 (man claimed to have been the "subject of a neutral power, taken on board of an enemy's ship; but forced . . . into the enemy's services"); *see also Three Spanish Sailors*, 2 W.B. 1324, 96 Eng. Rep. at 775 (Spanish

seamen claimed "they were taken as prisoners of war on board of a Spanish privateer," transferred to an English ship on promise of work for wages, and then turned over by the English captain as prisoners of war). [11]

The sole reference to the writ of habeas corpus in the Constitution confirms that the Framers did not intend access to the writ to extend to foreign nationals captured outside the United States. The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, *unless when in Cases of Rebellion or Invasion the Public Safety may require it.*" U.S. CONST. art. I, § 9 (emphasis added). The language of the exception confirms the Framers' understanding that the writ did not apply to military operations abroad. Only where military operations took place on U.S. soil was there any need to address the possibility of suspension. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866) (discussing martial rule and suspension of the writ in the context of invasion or rebellion within the United States). That the Framers were aware that the United States could be called upon to fight in foreign wars cannot be doubted. Yet, they did not provide for suspension of the writ in cases of attacks by or upon American forces abroad. The absence of any exception in the case of overseas conflicts indicates that the Framers never intended that the writ would be *extended* to aliens involved in wars on foreign soil. Moreover, such an extension would mean that the writ could *never* be suspended in the case of foreign conflicts. The limited reach of the writ is further confirmed by the reference to "the Public Safety," tying both the scope of the writ and the scope of the exception to the domestic body politic.

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11. Contrary to the suggestion made in the Brief Amici Curiae of Legal Historians in Support of Petitioners at 20-24, English common law cases do not reveal searching judicial review into whether persons seeking the writ were in fact "alien enemies." Instead, as discussed above, each of the cases cited by the Legal Historians involves threshold dismissal of the petitioner's case regardless of his factual allegations attacking his "alien enemy" or "prisoner of war" status.

Not only do petitioners' claims to the writ lack any support in its history or the text of the Constitution, they can find no support in the decisions of this Court. Petitioners' argument on this score is a contrived pastiche of quotations from cases involving criminal defendants, resident aliens, or persons convicted of war crimes in military tribunals. What petitioners cannot find is any precedent for a court entertaining the writ to examine and possibly overturn the President's judgment that a foreign national captured in the field of battle must be held as an enemy combatant while hostilities are ongoing. The lack of any such case is a testimony to the extraordinary expansion of both the writ and judicial power sought by these petitioners.

Both sets of petitioners also rely heavily upon this Court's decisions in *Quirin* and *Yamashita* for the proposition that jurisdiction lies here and the only question at issue is scope of review. Neither decision supports the exercise of habeas jurisdiction over these petitioners' claims. *Quirin* does not even suggest that foreign nationals held as enemy combatants can invoke the writ. The Court avoided the question by noting that at least one petitioner (Haupt) claimed to be an American citizen and *all* the petitioners had at one time been residents of the United States. 317 U.S. at 20. This Court has subsequently indicated that jurisdiction in *Quirin* was predicated on several factors, none of which is present in the context of detention of enemy combatants captured abroad.[12] In fact, the *Quirin* Court expressly left open the question whether Congress had *any* constitutional authority to "restrict the power of the Commander-in-Chief to deal with enemy belligerents." *Id.* at 20. *Quirin* certainly cannot be read for the proposition that Congress has

12. *See, e.g., Eisentrager*, 339 U.S. at 779-80 (distinguishing *Quirin* because, *inter alia*, it involved a prisoner who "was, or claimed to be, a citizen," the prisoners "were tried by a Military Commission sitting in the District of Columbia when civil courts were open and functioning normally," and "[t]hey were arrested by civil authorities and the prosecution was directed by the Attorney General, a civilian prosecutor").

limited the power of the Executive to detain "enemy belligerents" through the vehicle of the habeas corpus statute.

More fundamentally, neither *Quirin* nor *Yamashita* involved review of a military decision to detain foreign nationals as enemy combatants in order to incapacitate them during hostilities. Both cases involved the individualized trial and punishment of particular prisoners of war for violations of the laws of war. The military commissions in which the *Quirin* petitioners and Yamashita were tried were held pursuant to a statute recognizing the President's authority to convene military commissions consistent with the laws of war. *See Quirin*, 317 U.S. at 26-27; *Yamashita*, 327 U.S. at 7. In both cases, the Court refused to engage in any examination of the merits of the military commission's decision, focusing only on whether there was jurisdiction within the terms of the Articles of War. *Quirin*, 317 U.S. at 25 ("We are not concerned here with any question of the guilt or innocence of petitioners."); *Yamashita*, 327 U.S. at 17 ("We do not here appraise the evidence on which petitioner was convicted. . . . These are questions within the peculiar competence of the military officers composing the commission and were for it to decide.").

Thus, the *Quirin* and *Yamashita* Courts not only limited their inquiries to the question of jurisdiction, they expressly eschewed any review of the underlying merits of the military decisions themselves. Neither case says anything about judicial review of enemy combatant status, or the power of the President to detain enemy combatants during ongoing hostilities. And both cases decline to review exactly the kind of military judgments concerning battlefield conduct and status that these petitioners seek to put before the federal courts.[13]

13. Indeed, even in the context of the review of detention of *resident aliens* under the Alien Enemy Act, this Court has recognized its constitutional and institutional incapacity to review the judgments of the President regarding a military need for continued detention of

(Cont'd)

Finally, it does not advance petitioners' cause to suggest that their circumstances—being alleged nationals of friendly nations caught up with enemy forces—are somehow unique in the annals of war. In fact, included among the more than 400,000 prisoners of war held in the United States during World War II were Russian or Polish nationals deemed to be enemy combatants by the United States or its allies. Many claimed to be civilians mistakenly swept up with the capture of German troops, and many were part of German forced-labor battalions who were involuntarily pressed into the service of the enemy. These prisoners of war were nationals of friendly nations, as petitioners claim to be here, but it was undoubtedly within the power of our military forces to meet them as enemies in the field and to hold them as enemy combatants when captured. They were no more entitled to the writ of habeas corpus than were the German troops whom they fought beside, and no court of law has ever held otherwise. If the writ lies for these petitioners, it must perforce lie for any enemy combatant who makes a *post hoc* claim that he was not an actual belligerent.

V. Judicial Review in this Context Would Cause Grave Harm to Both the Military and the National Security.

Petitioners' status as enemy combatants has been reviewed and re-reviewed within the Executive Branch and the military command structure. Nevertheless, petitioners claim that they are constitutionally entitled to an evaluation of the factual predicate for their detention through some judicial or quasi-judicial proceeding, involving an impartial arbiter and an

(Cont'd)

potentially hostile foreign nationals. *See, e.g., Ludecke*, 335 U.S. at 170 ("It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These matters are of political judgment for which judges have neither technical competence nor official responsibility.").

adversarial testing of evidence. What they seek is a judicial "check on the power of the executive," Al Odah Br. at 42, in order to alter the "executive's focus" from defending the nation to the protection of the personal liberties of those we are fighting against, *id.* at 45. By definition, the imposition of legal process on the Executive's exercise of the war power and the introduction of the judiciary as a second decision maker in this area will impair the efficiency of our military forces. The very purpose of such constraints in the domestic criminal realm is to sacrifice efficiency and unitary control in order to protect other values. As this Court has noted, extension of these concepts to the use of military power in armed conflict would have "significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *Verdugo-Urquidez*, 494 U.S. at 273; *Eisentrager*, 339 U.S. at 779.

Any such extension of the judicial power to the supervision of our military operations in time of war would not only be wholly unprecedented, but it would be fundamentally incompatible with the power to wage war itself, so altering and degrading that capacity as to negate the Constitution's grant of that power to the President.

First, the imposition of such procedures would fundamentally alter the character and mission of our combat troops. To the extent that the decisions to detain persons as enemy combatants are based in part on the circumstances of the initial encounter on the battlefield, our frontline troops will have to concern themselves with developing and preserving evidence as to each individual they capture, at the same time as they confront enemy forces in the field. They would be diverted from their primary mission—the rapid destruction of the enemy by all means at their disposal—to taking notes on the conduct of particular individuals in the field of battle. Like policeman, they would also face the prospect of removal from the battlefield to give evidence in a habeas court or a court-ordered proceeding. *See Eisentrager*, 339 U.S. at 779.

Nor would the harm stop there. Under petitioners' theory, the military would have to take on the further burden of detailed investigation of petitioners' factual claims once they are taken to the rear. Again, this would radically change the nature of the military enterprise. To establish the capacity to conduct individualized investigations and adversarial hearings as to every detained combatant would make the conduct of war—especially irregular warfare—vastly more cumbersome and expensive. For every platoon of combat troops, the United States would have to field three platoons of lawyers, investigators, and paralegals. Such a result would inject legal uncertainty into our military operations, divert resources from winning the war into demonstrating the individual "fault" of persons confronted in the field of battle, and thereby uniquely disadvantage our military vis-à-vis every other fighting force in the world.

Second, the introduction of an ultimate decision maker outside of the normal chain of command, or altogether outside the Executive Branch, would disrupt the unitary chain of command and undermine the confidence of frontline troops in their superior officers. The impartial tribunals petitioners seek could literally overrule command decisions regarding battlefield tactics and set free prisoners of war whom American soldiers have risked or given their lives to capture. The effect of such a prospect on military discipline and morale is impossible to predict, *Chappell* v. *Wallace*, 462 U.S. 296, 300, 305 (1983) (courts are " 'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have' " (citation omitted)), but it cannot be positive.

Third, exercising jurisdiction over petitioner's claims would directly threaten our relations with our allies in the continuing war effort. Allies will naturally hesitate to entrust us with prisoners captured in the field of battle if our military's promise to detain them is an empty one. If our allies question our ability to detain enemy combatants, or feel that their own actions may be subject to subsequent judicial scrutiny, they will have a strong

disincentive to turn battlefield prisoners over to the United States, thus denying our forces a potentially valuable source of intelligence. Indeed, a detailed set of post hoc judicial procedures imposed upon the capture of prisoners of war may well have the perverse effect of encouraging both allies and our own forces to prefer lethal over non-lethal force.

Fourth, judicial review of presidential judgments regarding the treatment of prisoners of war would directly undermine the ability of the United States to speak with "one voice" to allies, neutrals, and foes alike. Promises made to allies could be broken by judicial decree, and threats made to the enemy could be rendered idle. *Eisentrager*, 339 U.S. at 779 ("Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.").

Finally, by necessity the decisions of the Executive Branch in this area are based upon myriad intelligence sources, many of which are extremely sensitive in nature. In the context of the "impartial review" petitioners seek, must the Executive produce or identify the intelligence sources regarding petitioners' adherence to the enemy or their activities in the field of battle? The imposition of adversarial proceedings on executive decision making in this area entails the possibility that the Executive may be forced to release a person whom he knows to be hostile and to pose a continuing threat to our military operations in order not to comprise intelligence sources. While we are willing to accept such a possibility in the enforcement of our criminal laws, *see, e.g.*, Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16, we simply cannot do so in the context of our national security.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed on the ground that the military judgments at issue in these cases are political questions whose resolution is textually committed to the President as Commander-in-Chief.

Respectfully submitted,

ANDREW G. MCBRIDE
Counsel of Record
KATHRYN L. COMERFORD
WILEY REIN & FIELDING LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000

Attorneys for Amici Curiae

(40) (38)

Nos. 03-334, 03-343

Supreme Court, U.S.
FILED
MAR 3-2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SHAFIQ RASUL, et al.,

Petitioners,

v.

GEORGE W. BUSH
PRESIDENT OF THE UNITED STATES, et al.,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE HONORABLE BILL OWENS, GOVERNOR OF THE STATE OF COLORADO, AND THE HONORABLE RICK PERRY, GOVERNOR OF THE STATE OF TEXAS, IN SUPPORT OF RESPONDENT UNITED STATES

CYNTHIA HONSSINGER
Chief Counsel
ROBERT A. MCGUIRE
OFFICE OF GOVERNOR
BILL OWENS
136 State Capitol
Denver, Colorado 80218
Telephone: (303) 866-6380

RICHARD A. WESTFALL
Counsel of Record
ALLAN L. HALE
HALE HACKSTAFF FRIESEN, LLP
1430 Wynkoop Street
Suite 300
Denver, Colorado 80202
Telephone: (720) 904-6000

DAVID M. MEDINA
General Counsel
OFFICE OF GOVERNOR RICK PERRY
P.O. Box 12428
Austin, Texas 78711
Telephone: (512) 463-1788

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are current governors of States of the United States, who share or have shared responsibility for assuring the safety and protection of the people of their respective States. This Court has recognized that, "As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence." *Sterling v. Constantin*, 287 U.S. 378, 399 (1932).

The names and offices of the *amici curiae* include:

The *Honorable Bill Owens* is Governor of the State of Colorado. He has served as Governor of Colorado since 1998.

The *Honorable Rick Perry* is Governor of the State of Texas. He has served as Governor of Texas since 2000.

Each of the *amici curiae* is persuaded that these cases present issues of domestic security that are of grave importance to the chief executives of the States of the United States. Accordingly, pursuant to Supreme Court Rule 37.4, *amici curiae* respectfully submit this brief in support of the Respondents, including George W. Bush and the United States of America.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for any party authored this brief either in whole or in part and no person, other than the *amici curiae* or their counsel, made any monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

As public officials with responsibility for the domestic security of their States, *amici curiae* believe that permitting Petitioners access to United States courts would detract from the ability of state chief executives to maintain law and order by imposing on the States and their individual citizens a serious and unnecessary threat to public safety. It is important to the chief executives of States that captured foreign combatants not be permitted to utilize the domestic courts of the United States either to hamper the nation's war effort through litigation or to exacerbate the threat to domestic security of the States that the detainees and their yet-to-be-subdued enemy allies continue to pose.

ARGUMENT

The pertinent question before this Court in both *Rasul v. Bush*, 321 F.3d 1134 (D.C. Cir 2003), *cert. granted*, 124 S. Ct. 534 (2003), and *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003), is whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

As Respondents' briefs comprehensively address the constitutionality of the detention regime at the Guantanamo Bay Naval Base, Cuba, this brief will focus on the ramifications to the States of a decision permitting foreign nationals captured abroad in connection with hostilities to litigate their detention status in the United States courts prior to the end of the conflict in which they were captured

and the subjugation of the terrorist organizations with which they are allied.

I. THE WAR ON TERROR HAS TAXED GOVERNORS' ABILITY TO RESPOND TO DOMESTIC EMERGENCIES BY PROLONGING THE DEPLOYMENT OF STATE NATIONAL GUARD ELEMENTS

States often rely on their Air and Army National Guard units to help preserve domestic order in emergencies such as floods, fires, earthquakes, hurricanes, and riots. Since the war on terrorism began on September 11, 2001, state National Guard forces drawn from virtually every State have been deployed outside the country to serve in active military operations. National Guardsmen have also undertaken new homeland security duties, including guarding airports, stadiums, and other symbolic structures against potential terrorist attack.

These new uses of National Guard resources have reduced the number of Guardsmen available for governors to use in responding to traditional state emergencies. More than 300 Colorado Air and Army National Guardsmen are currently deployed under federal control in Iraq, Afghanistan, Kuwait, and Qatar. An even greater number of Colorado Guardsmen are mobilized for duty and serving in the war on terrorism within the United States. In Colorado, current deployments total nearly 25% of the Colorado Guard's assigned manpower,[2] a level of mobilization

[2] "Assigned" manpower indicates the actual number of individuals available, as opposed to "authorized" manpower, which is the number of individuals required in units for 100% effectiveness.

that necessarily degrades incident reaction times due to a reduced pool of available volunteers. Other States face even greater levels of deployment (some as high as 40% or more) and accordingly suffer the greater attendant reductions in response capability that those higher deployment levels entail. *See* Robert Tanner, *Governors Ask About Guard Use*, Denver Post 4A (Feb. 23, 2004). Since the National Guard Bureau, which oversees all reserve forces, has reported to the governors of the States that deployments will ultimately be managed so that one-quarter of each State's units will be deployed for federal needs, *id.*, the existing demands on the Army and Air National Guard in Colorado and other States are unlikely to abate until enough further progress has been made in the war against America's enemies to warrant a reduction in the federalization of state National Guard elements.

To the extent that the military goals of inhibiting threats to U.S. forces; disrupting enemy command relationships; and gathering intelligence are beneficial to the war effort, allowing the enemy detainees held at the Guantanamo Bay Naval Base to frustrate these objectives through litigation in the courts of the United States will contribute to an ongoing reduction in the availability of National Guard resources for governors to use in responding to domestic emergencies.

II. PERMITTING DETAINEES TO LITIGATE THEIR DETENTION STATUS IN UNITED STATES COURTS IMPOSES RISKS TO DOMESTIC SECURITY, WHICH GOVERNORS ARE RESPONSIBLE FOR MAINTAINING

A. If the detainees are granted access to United States courts, many of them will invariably end up in physical custody on United States soil

Because courts issuing writs of habeas corpus may compel the Department of Defense to bring prisoners before them for hearings, access to United States courts essentially means the Petitioners will in all likelihood need to be brought to the United States. Once Petitioners are granted access to United States courts, next friends of similarly situated detainees will inevitably seek review of other cases in the federal courts. In addition to these cases, brought originally in the District of Columbia Circuit, parties claiming to be next friends of the Guantanamo Bay prisoners have also sought the adjudication of some detainees' status in at least one other circuit court. *See, e.g., Coalition of Clergy, Lawyers & Law Professors v. Bush,* 310 F.3d 1153 (9th Cir. 2002); *Gherebi v. Bush,* 352 F.3d 1278 (9th Cir. 2003). The prospect arises that Guantanamo Bay detainees could end up before federal courts in many jurisdictions around the country. Given the large number of detainees currently being held at Guantanamo Bay; the unique individual circumstances surrounding the capture of many of them; and the likelihood in the face of ongoing hostilities that further detentions could result in increases in the detainee population, it is reasonable to suppose that, once federal courts are held to have jurisdiction over these cases, numerous States could be faced with the necessity of hosting one or more proceedings, any or all

of which might be expected to require the physical presence of Guantanamo Bay detainees for an indeterminate period of time within state borders.

B. Once on United States soil, the prisoners will themselves pose a risk to domestic security

1. Risk to communities of escape

The nature of the prisoners being held at Guantanamo Bay Naval Base creates an inherent risk to domestic security in the event of their escape. As Secretary of Defense Donald Rumsfeld recently stated in a Department of Defense News Briefing, "[The Guantanamo prisoners] include not only rank and file soldiers who took up arms against the coalition in Afghanistan, but they include senior Al Qaeda and Taliban operatives, including some who may have been linked to past and potential attacks against the United States, and others who continue to express commitment to kill Americans if released. Very simply, the reason for their detention is that they're dangerous." Donald Rumsfeld, Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce ¶¶ 25-26 (Feb. 13, 2004) <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html>.

The risk of a detainee's escape, though small, is real. Escapes from state maximum-security correctional facilities occur commonly enough to justify the concern that one or more detainees might similarly elude federal civilian or military captors on United States soil. The risk of escape is aggravated by the fact that detainees brought to the United States for court proceedings will in all likelihood be subject to frequent transportation between locations, and

transportation periods characteristically present the greatest risk of escape. At the Guantanamo Bay facility, the potential for an escapee to harm civilians is substantially mitigated by the relative geographic isolation of the base. Such would not be the case, however, if a detainee were to escape on United States soil.

2. Risk to domestic security from associated persons

Proceedings examining the legality of a detainee's detention will inevitably require the presence of witnesses, including other detainees or third parties, who may themselves pose risks to domestic security for many of the reasons outlined above. Since the government could be subject to sanctions in any particular proceeding for failing to produce such witnesses as are within its control, *see United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003), permitting Petitioners access to the United States courts establishes a dynamic whereby the government's incentives in a potentially large number of cases will be misaligned with the interests of both public safety and national security.

3. Risk to national security from undesirable communication

Once detainees have been granted access to United States courts and proceedings have been initiated that require their presence on United States soil, there is little practical or desirable alternative to using the most highly secure federal facilities available within a particular jurisdiction to house them during the proceedings. Yet federal maximum-security custodial facilities today house

criminal inmates such as Ramzi Yousef (in Florence, Colorado), and Sheikh Omar Abdel Rahman (in Springfield, Missouri), among others, who have been convicted of committing terrorist acts against the United States in connection with Al Qaeda. One major national security interest governing the circumstances of incarceration of such individuals has been the goal of restricting potentially dangerous communication by these individuals both within and without prison,[3] including communication with their followers who may be represented among the Guantanamo Bay detainee population. Housing Guantanamo Bay detainees in the same federal facilities with these iconic terrorist leaders and others of their ilk for the duration of any legal proceedings risks the possibility of interaction and communication between the two that could ultimately damage United States national security.

[3] *See* Cam Simpson, *Terrorists Push Plots From Jail*, CHICAGO TRIBUNE (Nov. 19, 2001) (visited Feb. 26, 2004) <http://www.chicagotribune.com/news/chi-0111190247nov19.story?coll=chi-news-hed> ("El Sayyid Nosair, an Egyptian immigrant and follower of Rahman, played a key role in the 1990s bombing plots of New York landmarks, bridges and tunnels. The schemes were hatched despite Nosair being locked up at a New York City jail and a state prison, records show. At the time, Nosair was imprisoned for the murder on Nov. 5, 1990, of Rabbi Meir Kahane, a radical Zionist who promoted violence and the expulsion of Arabs from Israel.")

C. The physical presence of detainees on United States soil would create both incentives and opportunities for violent action by those supportive of the prisoners or opposed to the United States government

1. Foreign terrorists may retain the ability to strike inside the United States

The terrorist threat to the continental United States has not been eliminated, despite the nation's significant military and intelligence successes since September 11, 2001. Only 8 days before this Court's filing deadline for *amicus* briefs in these cases, Al Qaeda threatened the United States with further domestic attacks in a statement issued by Ayman al-Zawahiri, its top lieutenant to leader Osama bin Laden: "Bush, fortify your defenses and intensify your security measures, . . . because the Muslim nation, which sent brigades to New York and Washington, has decided to send you one brigade after another, carrying death and seeking Paradise." Neil MacFarquhar, *A Top bin Laden Aide Threatens New Attacks Against the U.S.*, N.Y. Times, Feb. 25, 2004 (visited Feb. 26, 2004) <http://www.nytimes.com/2004/02/25/international/middleeast/25ZAWA.html>.

The United States government takes such threats seriously and has told the American people as recently as February 24, 2004, that it believes Al Qaeda "sleeper cells" continue to exist and operate within the United States.[4]

[4] *See* Testimony of FBI Director Robert Mueller before Senate Select Committee on Intelligence, *Protecting National Security From a World of Threats: Director Mueller Testifies on Emerging Threats and*

(Continued on following page)

Substantiating this fear, the government in 2003 obtained convictions on charges of supporting terrorism in a case involving what President Bush called a "sleeper cell" comprised of six Al Qaeda-trained Yemeni Americans in Lackawanna, New York. *See* George W. Bush, President's State of the Union Address, para. 45 (Jan. 28, 2003) (visited Feb. 26, 2004) <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>. In light of these indicators, prudence requires governors to assume, and to urge this Court to share in the assumption, that there remain within the United States foreign terrorist operatives who are capable of carrying out large-scale terrorist acts on United States soil.

2. Court proceedings involving Guantanamo Bay detainees will present targets of opportunity with high symbolic and utility value for enemy terrorist cells in the United States

Assuming terrorist cells with the capability to conduct operations are present within the United States, there is every reason to anticipate that providing Petitioners (and, by extension, other Guantanamo Bay detainees) with access to United States courts would have an adverse impact on the domestic security of the States, as each resultant proceeding could come to serve as a target of

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the FBI's Response (Feb. 24, 2004) <http://www.fbi.gov/page2/feb04/threats022404.htm> ("This enemy still has the capacity to strike the U.S. both here and abroad with little or no warning . . . [A]l-Qa'ida retains a cadre of supporters within the U.S. which extends across the country.")

opportunity for terrorist violence. It is unnecessary to engage in speculation to understand the symbolic target value to Al Qaeda of wartime legal proceedings involving Guantanamo Bay detainees. Not only would such proceedings be highly visible media events, but the potential for civilian casualties in the kinds of urban areas most suitable for hosting proceedings of this nature would be large. Other, more utilitarian motivations for terrorist targeting of court proceedings involving Guantanamo Bay detainees are easy to postulate: Assassination of prisoners who could have information of value to the United States; forcible liberation of prisoners from United States custody; or violence against civilian jurors, judges, and bystanders for purposes of intimidation or retaliation. While the risk of violence in high profile proceedings can certainly be reduced through the employment of robust security measures, it can never be entirely eliminated.

D. Even if potential threats do not ultimately materialize, extreme security measures entailing large-scale disruption of daily life in urban centers will likely be required in order to adequately safeguard any domestic court proceedings involving Petitioners or other Guantanamo Bay detainees

Colorado's experience in hosting the Oklahoma City bombing trial of Timothy McVeigh and Terry Nichols, *United States v. McVeigh & Nichols*, Criminal Action No. 96-CR-68-M (D. Colo. 1996), in the capital city of Denver is instructive about the kinds of security measures that would be necessary to institute in a typical urban center in

order to host secure court proceedings involving Petitioners and other Guantanamo Bay detainees. The level of public disruption to be anticipated is of significant concern to *amici* in their role as governors, as is the residual elevated risk to public safety and domestic security that no amount of preparation can entirely mitigate. Security measures will need to be put into place to ensure both secure transportation and confinement logistics for Petitioners and the security of any court proceedings themselves. These measures will cause significant disruption of civic life wherever they may need to be instituted.

1. Disruption from transportation and confinement measures

Prisoners participating in proceedings, hearings, or advisements require transportation from detention facilities to courtroom facilities. Unlike routine prisoner transport and court proceedings, transport and proceedings involving high-threat prisoners require extensive planning and additional staffing as well as additional materiel in the form of vehicles, weapons, and a wide array of equipment, both technological and tactical. Cooperation is also required from a combination of federal, county and metropolitan agencies that represent all of the jurisdictions through which the transport will pass, in addition to state patrol officers on any highway route over which the State has jurisdiction.

In the Oklahoma City bombing trial, when the two defendants were transferred to Colorado from Oklahoma, county sheriff helicopters were required to transport the prisoners from the airport to a federal facility, and three Colorado National Guard helicopters were subsequently

needed to transport the prisoners across a large section of the State in order to house them in federal correctional facilities. Helicopter transportation of this sort cannot be accomplished without accompanying ground support along the flight path. Given that terrorists have routinely used shoulder-fired antiaircraft weapons to attack American military aircraft in Iraq, *see, e.g.*, Satinder Bindra, *5 Killed, 1 Wounded in Protests in Southern Iraq: U.S. Military Fear Black Hawk Downed By Enemy Fire*, CNN (Jan. 10, 2004) <http://www.cnn.com/2004/WORLD/meast/01/10/sprj.nirq.main/index.html>; and civilian aircraft in Africa, *see, e.g.*, BBC News, *Kenyan Police Find Mombasa Missiles* (Dec. 6, 2002) <http://news.bbc.co.uk/2/hi/africa/2552097.stm>; and are suspected by the federal government of having the weapons necessary to conduct similar attacks here in the United States, *see, e.g.*, United States Department of State, Bureau of International Information Programs, Press Release, *U.S. Believes Terrorists Still Pose Threat to Civil Aviation* (Nov. 5, 2003) <http://usinfo.state.gov/topical/pol/terror/texts/03110502.htm>, it is reasonable to anticipate that those who would act either in support of Petitioners and other Guantanamo Bay detainees, or to silence them, pose a significantly more tangible security risk than authorities confronted during the Oklahoma City bombing trial.

The commitment of ground support resources during air transport is significant even under ordinary circumstances, since it is not sufficient to simply have law enforcement agencies on unstructured standby. Ground support needs to be prepared to respond in the event of a problem with a helicopter or problems with any of the prisoners, and officers must be ready to take tactical action immediately at any point along the route of transit.

During the Oklahoma City bombing trial, this necessity meant that the Colorado State Patrol, sheriffs in several jurisdictions, and many local police departments were compelled to commit resources to security duty that would otherwise have been dedicated to normal responsibilities. Furthermore, this commitment is not likely to be a singular occurrence in the event of involved proceedings. During the Oklahoma City bombing trial, for example, it was necessary to move the prisoners back and forth from the United States Courthouse in Denver to secure detention sites twice a day for several weeks. Proceedings involving Petitioners or other Guantanamo Bay detainees are likely to consume an even greater share of state and local law enforcement resources, all to the detriment of public safety.

To the extent air transportation is non-optimal, a transport using vehicles alone can be similarly problematic. Regardless of intelligence indications about the likelihood of an attack on a transport caravan, secure transit requires that vigilance and proper practices be maintained at all times. The goal of moving prisoners from one location to another with few or no stops, thereby allowing little or no opportunity for targeting any of the vehicles, means that moderate to high speeds of travel must be maintained. This requirement in turn necessitates traffic blocking at intersections along the transit route. The very nature of secure caravan transport – several vehicles clustered together and traveling at a higher than normal rate of speed – is disruptive to traffic on highways and city streets.

As a practical matter, early morning and late evening transport can be used to avoid some of the traffic issues associated with transporting high-risk prisoners, but these

options are poor for several reasons: First, a courthouse is not generally a safe setting for holding a high-risk prisoner, as it is a non-maximum security environment. Second, transporting prisoners in less congested circumstances raises the risk of successful attack. Third, the pattern of traffic volumes in metropolitan areas will require leaving the federal courthouse late at night and necessitate returning again in the very early morning hours. These scheduling requirements do not allow prisoner needs to be met and will have a detrimental impact on all state and local law enforcement agencies that may be forced to change regular staffing arrangements during those time periods when law enforcement resources are most in demand for the performance of ordinary essential duties.

2. Disruption from measures necessary to secure the proceedings

Any proceedings involving Petitioners or other Guantanamo Bay detainees that needed to be conducted in the federal courthouse in Denver would require security measures that could literally shut down portions of Colorado's capital city. The United States Courthouse in Denver is in close proximity to a post office, bus station, several private office buildings, the former United States Courthouse, the federal office building and the historic Federal Appeals Court. In front of the Appeals Courthouse is a Regional Transportation District light-rail stop that is used by downtown commuters. The complex includes the Federal Customs House building, which houses the United States Bankruptcy Court, the intake location for military recruiting in the region, federal offices, and a day-care center.

The overall scene, if court proceedings for Petitioners or other Guantanamo Bay detainees were to be held in the District Courthouse, would be that of a federal courthouse surrounded by government and private office buildings that, in the daytime, would contain thousands of occupants. Every sidewalk in the immediate area would be congested with downtown workers, international media, and federal and local law enforcement. Vehicle traffic in and out of downtown in that area would be slow and often stopped. This environment would present a significant opportunity for terrorist activity. The alternative, blocking off a six square-block area at the edge of Downtown Denver, would bring much of the downtown area comprising Denver's economic center to a halt for weeks. Furthermore, since the federal government is only responsible for the interior and immediate exterior of courthouses, securing the area would be the responsibility of the Denver Police Department. During the Oklahoma City bombing trials, this responsibility had a tremendous impact on the staffing and budget of the Denver Police Department. An even higher-threat proceeding would of course have a much greater impact.

This concern arises for all States where proceedings may be held. For example, federal courts are located in all major urban areas of Texas including Austin, the state capital, and Houston, a major port for the nation. Each court is located centrally in each city and the disruption and dangers due to security issues would be overwhelming and would unnecessarily endanger the populace and the economy of Texas and the United States. In Austin, the federal courthouse already has required the closure of a downtown street causing disruption in the traffic flow and the federal courthouse is located within walking distance

of state governmental buildings including the capitol, the major county hospital, and the University of Texas.

3. Potential for multiple proceedings in different locations

The security concerns associated with proceedings involving Petitioners or other Guantanamo Bay detainees do not, of course, differ qualitatively from the concerns that exist whenever States must deal with high-risk prisoners in high-profile proceedings. However, it is important for this Court to be aware that governors consider Petitioners, due to their potential affiliation with a global terrorist network, to pose risks that are of a different order of magnitude than would ordinarily be the case for a more typical high-security trial or criminal proceeding.

Even with all of the disruption that it entailed, the Oklahoma City bombing trial posed a manageable security risk at least in part because it was a "one-off" event, that is, a relatively unique occurrence. The United States naval base at Guantanamo Bay, however, currently holds in excess of 600 enemy combatants from more than 40 countries, at least some of whom (if not the large majority), are likely to be affiliated with Al Qaeda. A ruling favorable to the Petitioners raises the prospect of literally hundreds of separate proceedings involving extremely high-risk individuals transpiring nearly simultaneously in multiple jurisdictions. To make matters worse, given that the war on terror is not yet won, the number of detainees currently on hand at the Guantanamo Bay Naval Base could only be a starting point, rather than an ending point; and the variation in individual detainee circumstances

could become much more diverse, rather than less. Thus the threat to the States' domestic security that could result from a ruling favorable to Petitioners is essentially open-ended. This presents a grave challenge to governors in the fulfillment of their responsibilities as chief executives. *Amici curiae* accordingly urge this Court to consider the ramifications of its decision in these cases, since the effect on governors' ability to perform their essential duty of maintaining domestic security is likely to be profoundly affected by any outcome in Petitioners' favor.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

CYNTHIA HONSSINGER
Chief Counsel
ROBERT A. MCGUIRE
OFFICE OF GOVERNOR
BILL OWENS
136 State Capitol
Denver, Colorado 80218
Telephone: (303) 866-6380

RICHARD A. WESTFALL
Counsel of Record
ALLAN L. HALE
HALE HACKSTAFF FRIESEN, LLP
1430 Wynkoop Street
Suite 300
Denver, Colorado 80202
Telephone: (720) 904-6000

DAVID M. MEDINA
General Counsel
OFFICE OF GOVERNOR RICK PERRY
P.O. Box 12428
Austin, Texas 78711
Telephone: (512) 463-1788

Supreme Court, U.S.
FILED
MAR 3- 2004
OFFICE OF THE CLERK

(4) (39)

Nos. 03-334 and 03-343

In the
Supreme Court of the United States

SHAFIQ RASUL, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

FAWZI KHALID FAHAD ABDULLAH AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF ALABAMA, OHIO, TEXAS, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Richard F. Allen
Acting Attorney General

Kevin Newsom
Solicitor General

John J. Park, Jr.
Assistant Attorney General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7997, (334) 242-7401*

March 3, 2004

(Additional counsel for amici curiae are listed inside the front cover)

BEST AVAILABLE COPY

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 East Broad Street
17th Floor
Columbus, Ohio 43215

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
P.O. Box 12548
Austin, Texas 78711-2548

JERRY W. KILGORE
ATTORNEY GENERAL
COMMONWEALTH OF VIRGINIA
900 East Main Street
Richmond, Virginia 23219

QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba?

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INTEREST OF AMICI CURIAE

The States of Alabama, Ohio, Texas, and Virginia submit this Brief as amici curiae under Supreme Court Rule 37.4, in support of the United States and its officials who are named as Respondents in these cases. These cases arise from the detention at the Guantanamo Bay Naval Base of foreign nationals captured by American and Coalition military forces engaged in military operations in Afghanistan. The foreign-national detainees seek to challenge the bases for their detention in the federal courts through pleadings that have been treated as petitions for habeas corpus.

Notwithstanding the fact that the detainees are in the custody of the Government of the United States, the amici States have a compelling interest in the outcome of this case. First, they have an interest in the successful prosecution and swift resolution of the war on terrorism, of which the operations in Afghanistan are unquestionably a part. The Constitution vests the power to direct and control military operations in the political branches, and judicial interference may adversely affect the outcome of ongoing operations.

Second, citizens of the amici States serve on active duty as soldiers, sailors, airmen, and Marines, and in the Reserve and National Guard components of our armed forces. The members of the National Guard, in particular, constitute a State militia under the command of the Governor that has been mobilized for federal service and deployed. The 20th Special Forces Group of the Alabama Army National Guard, which has its headquarters in Birmingham, Alabama, for example, deployed to and served in Afghanistan and elsewhere. The States have an interest in their soldiers' performance of their military missions and their safe return.

Furthermore, those soldiers have been trained in and observe the law of war. The amici States contend (i) that the confinement of these foreign national detainees is consistent with the law of war, and (ii) that the best way to encourage compliance with the law of war is to confer its benefits on those who comply with it and to deny its benefits to those who do not.

STATEMENT OF THE CASE

In response to the attacks of September 11, 2001, for which the al Qaeda terrorist network claimed credit, American forces deployed to Afghanistan and dethroned the Taliban government that had harbored al Qaeda. Following those attacks and pursuant to its powers under Article I of the Constitution, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks ... or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001). The President then exercised his constitutional powers as Commander in Chief of the nation's armed forces and, among other things, ordered selected reserve units and selected individual ready reserve soldiers to active duty and deployed them to Afghanistan. *See* 10 U.S.C. § 12304. There, they undertook military operations that toppled the Taliban government and put al Qaeda operatives to flight. Petitioners and others were detained in the course of those operations and are currently confined at the Guantanamo Bay Naval Base on Cuba.

According to press reports, some 650 individuals are confined at Guantanamo. Other suspected terrorists and enemy combatants have been detained at Bagram Air Force Base outside Kabul in Afghanistan, on Diego Garcia

in the Indian Ocean, and elsewhere. The Guantanamo detainees come from a variety of countries, including, but not limited to, Afghanistan, Saudi Arabia, Yemen, Pakistan, Jordan, Egypt, Kuwait, Britain, and Australia. Daly, *Revealed: The Nationalities of Guantanamo*, Feb. 4, 2004.[1] Daly writes, "Camp Delta also holds seven Arab men handed over to U.S. authorities in Bosnia, as well as five individuals arrested in Malawi last summer." *Id.* As Daly observes, this variety illustrates "the global metastasizing of terrorism." *Id.*

The *al Odah* Petitioners are Kuwaitis who allege that they were volunteers providing humanitarian aid in Afghanistan and Pakistan. Local villagers seeking bounties allegedly turned them over to United States forces. The *Rasul* Petitioners include two British citizens and an Australian. They also allege that they were in Afghanistan or Pakistan for benign purposes. *See Al Odah v. United States*, 321 F.3d 1134, 1136 (D.C. Cir. 2003).

Petitioners' claims, which must, of course, be taken as true, should nonetheless be placed in perspective. First, Petitioners represent only a small number of those initially detained in Afghanistan. According to the Department of State's Legal Advisor, William Taft, more than 10,000 detainees were screened in Afghanistan, and the "vast majority" were released. See William Taft, *Guantanamo Detention is Legal and Essential*, Financial Times, January 12, 2004, at p. 19. Taft explained that American policy "was, and is, that only enemy combatants who pose special security, intelligence or law enforcement concerns are transferred to Guantanamo." *Id.* Second, Guantanamo is not the only location at which foreign

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[1] Available at http://www.upi.com/view.cfm?StoryID=20040 204-051623-5923r.

nationals captured in connection with the hostilities are in custody. Others are detained outside the United States subject to American custody at Bagram Air Force Base, on Diego Garcia, and elsewhere. Third, at least two of the Guantanamo detainees have been charged with serious national security criminal offenses. Ibrahim Ahmed Mahmoud al Qosi of Sudan and Sulayman al Bahlul of Yemen, both of whom have been accused of serving as bodyguards for Osama bin Laden, have been charged with conspiracy to commit war crimes and will be tried before military commissions. Taylor, *Al Qaeda Suspects Will Face Tribunals*, The Washington Times, February 25, 2004.[2] Finally, according to the Pentagon, eighty-eight detainees have been released, and 12 more have been turned over to authorities in their respective countries. *Guantanamo Prisoners Turned Over To Russia*, Associated Press, March 1, 2004.[3] According to the Pentagon, "[t]he decision to transfer or release a detainee is based on many factors, including whether the detainee is of further intelligence value to the United States and whether he poses a threat to the United States." *Id.*

SUMMARY OF ARGUMENT

Even as American and Coalition forces remain engaged in operations in Afghanistan and Iraq, aliens who were captured in the war zones in Afghanistan and are now detained at Guantanamo Bay Naval Base in Cuba seek to challenge their confinement in federal court. This Court has historically deferred to the military, particularly in times of war. This Court has further emphasized that conditions of war may remain even after

[2] Available at http://www.washingtontimes.com/functions/print.php?StoryID=20040224-115145-8590r.

[3] Available at http://www.al.com/printer/printer.ssf?/base/ politics-2/107815704617-1780.xml?aponline.

principal military operations have concluded. In *Johnson v. Eisentrager,* 339 U.S. 763 (1950), for example, this Court concluded that the claims of German nationals captured in China, convicted of furnishing intelligence information to enemies of the United States, and confined at Landsberg Prison in Germany had no right to invoke the writ of habeas corpus. Any complaints regarding observance of the Geneva Conventions were for the political and military authorities to resolve. *Id.* at 789 n.14; *see also Ludecke v. Watkins,* 335 U.S. 160 (1948). So, too, here, this Court should defer to the military and political authorities.

Deference is appropriate because gauging the consequences of judicial intrusion into ongoing military operations is outside the role and beyond the institutional competence of the federal courts. Petitioners were detained because, in the judgment of military experts and those in the policymaking branches, they posed a clear and present danger to American and Coalition forces and threatened the successful conclusion of the war on the al Qaeda terrorists in Afghanistan. They were removed to a site far from the field of battle, where they are safe from the danger of continued fighting and no longer present a threat to American and Coalition forces. These battlefield decisions should not be second-guessed by the federal courts, particularly when military operations have not yet concluded in Afghanistan.

ARGUMENT

1. This Court should defer to the Executive and Legislative branches in the conduct of military operations.

The Constitution unambiguously assigns the power to raise and deploy the armed forces to the Executive and Legislative branches. The President is

denominated "Commander in Chief" and thereby empowered to direct the operations of the armed forces. U.S. Const. art. II, § 2, cl. 1. Congress is empowered to give the President the tools he or she needs; it can raise, support, and govern the armed forces and declare war. U.S. Const. Art. I, § 8, cls. 11, 12, 13, 14. This Court has recognized that these powers are "plenary." *See Solorio v. United States,* 483 U.S. 435, 441 (1987) ("[T]here is no indication that the grant of power in [art. I, § 8, cl. 14, to regulate the Armed Forces] was any less plenary than the grants of other authority to Congress in the same section."); *Chappell v. Wallace,* 462 U.S. 296, 301 (1983) ("explicit grant of plenary authority to Congress"). The military operations in Afghanistan reflect this constitutional allocation of power. Congress authorized the President to use "all necessary and appropriate force" to respond to the September 11, 2001 attacks, and the President sent American military forces to Afghanistan where forces from other Coalition countries joined them.

As the Question Presented itself states, Petitioners were "captured abroad in connection with hostilities." Petitioners' complaints are with the decisions of American military commanders to capture and detain them. These decisions were – and are – made in the field and reflect a military judgment that the detention of Petitioners and their removal from Afghanistan would advance the prospect of success of the mission and the safety of their soldiers. The detention decisions of the field commanders were reviewed and approved according to the chain of command and, further, by officials in the Departments of Defense and Justice. This Court should defer to the military commanders' exercise of their expert professional judgment, particularly while American and Coalition forces are still actively engaged in hostilities.

Deference in this case is consistent with this Court's deference to military officials' judgments concerning other issues, ranging from the raising of armies to the command structure to uniforms. In *Rostker v. Goldberg,* 457 U.S. 57 (1981), for example, which involved registration with the Selective Service, this Court observed, "This case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Id.* at 64-65; *see also id.* at 70 ("[J]udicial deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.") Similarly, in *Chappell v. Wallace,* this Court unanimously held that enlisted sailors could not sue their superior commissioned and noncommissioned officers for injuries sustained as a result of alleged violations of their constitutional rights in the course of military service. This Court stated, "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers ..." 462 U.S. at 300; *see also United States v. Stanley,* 483 U.S. 669 (1987). Likewise, in *Goldman v. Weinberger,* 475 U.S. 503 (1986), this Court deferred to the "considered professional judgment" of the Air Force regarding the need to standardize uniforms and subordinate personal sartorial preferences to unit cohesion. *Id.* at 508.[4] Finally, in *Greer v. Spock,* 424 U.S. 828 (1976), and

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[4] This Court's decision in *Goldman*, of course, was subsequently overruled by Congress in Pub. L. No. 100-180 (codified at 10 U.S.C. § 774), which presumptively permits the wearing of religious apparel by members of the armed forces. Congress' action illustrates precisely the point the amici States make here: that decisions concerning military matters are left to the policymaking branches.

Brown v. Glines, 444 U.S. 348 (1980), this Court sustained against First Amendment challenges to Army and Air Force regulations that limited the distribution of literature on military bases. In so doing, this Court deferred to the judgment of commanders charged with ensuring the readiness of the units under their command.

These instances of deference to military authorities rest on this Court's acknowledgment that the powers and abilities of the Judicial Branch – particularly as they pertain to military and national security issues – are limited. As this Court has stated:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973); *see also Chappell*, 462 U.S. at 305 ("[C]ourts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority may have.") (quoting Warren, The Bill of Rights and the Military, 37 N.Y.U. L. Rev. 181, 187 (1962)). In a similar vein, this Court has recognized that "[c]ongressionally uninvited intrusion into military affairs is inappropriate," because it can have dangerous and unforeseen consequences. *Stanley*, 483 U.S. at 683.

Deference that is appropriate with respect to military discipline, uniforms, and speech is all the more appropriate when, as here, the challenge is to a battlefield decision made in time of active hostilities. Indeed, the

very policy underlying deference in peacetime – the need to ensure that the military can perform its mission when it deploys, *see Brown v. Glines*, 444 U.S. at 354 – demonstrates *a fortiori* the need for wartime deference.

Recognizing the dangers posed by uninvited intrusion in military affairs, the courts have rightly hesitated to interfere with military operations at the time of deployment. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), this Court observed:

> Certainly, it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.

Id. at 789. Any complaint about the deployment of American armed forces to a foreign country "involves a challenge to the conduct of diplomatic and foreign affairs, for which the President is exclusively responsible." *Id.* The lower courts have also deflected challenges to the deployment of American forces, finding the claims nonjusticiable for various reasons. *See, e.g., Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) (Iraq); *Conyers v. Reagan*, 765 F.2d 1124 (D.C. Cir. 1985) (Grenada); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (El Salvador), *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999) (Yugoslavia); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (Iraq).[5] The restraint shown by the courts illustrates an awareness of the hazards that judicial intervention into military affairs poses.

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[5] This Court's decision in *Perpich v. Department of Defense*, 496 U.S. 334 (1990), likewise has the effect of deflecting a Governor's challenge to the mobilization and deployment of National Guard units for training in Central America.

Courts have declined to intervene not only on the front-end of hostilities at the time of deployment, but on the back end as well. Indeed, courts have refused to wade into the thicket of military affairs even after hostilities seem to have concluded. In *Johnson v. Eisentrager,* this Court observed that allowing German nationals confined in Landsberg Prison in Germany after World War II was over to file petitions for habeas corpus would have pernicious effects on the military. Even then, during the "twilight between war and peace," sifting through the detainees' complaints would drain military resources. 339 U.S. at 779. More significantly, this Court emphasized that, in times of active hostility,

> Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military effort abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Id.

Similarly, in *Ludecke v. Watkins,* 335 U.S. 160 (1948), this Court affirmed the denial of habeas corpus relief to a German national who had been interned in the United States as an enemy alien in 1942 and was ordered deported in 1946. This Court rejected the contention that

World War II had ended in 1945 with the cessation of active hostilities, such that deportation was no longer warranted. Rather, this Court stated that the determination when the war was over was "not for us," but was, instead, a "matter[ ] of political judgment for which judges have neither technical competence nor official responsibility." 335 U.S. at 170.

Again, this case likewise calls for deference to the military experts and the policymaking branches. Coalition forces remain engaged in Afghanistan; indeed, the situation today is surely hotter than that in Germany in 1948. Petitioners seek to involve the federal judiciary in the review of decisions of military commanders and the Executive branch. Those commanders took the performance of their mission and the safety of their service members into account in deciding to detain and confine Petitioners and others similarly situated. This Court should hesitate before second-guessing these military decisions, even indirectly.[6]

2. The Court of Appeals correctly concluded that Petitioners have no right to contest the legality and conditions of their

---

[6] Furthermore, to the extent Petitioners seek to vindicate rights claimed under various Treaties through the writ of habeas corpus, they run head-first into, among other things, *Eisentrager*. There, this Court rejected the attempt to invoke the protection of the 1929 Geneva Convention, explaining:

> It is ... the obvious scheme of the Agreement that responsibility for observance and enforcement of these [Treaty] rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by presidential intervention. 339 U.S. at 789 n.14.

confinement outside the United States in federal court.

The D.C. Circuit correctly read *Johnson v. Eisentrager* in deciding that Petitioners have no right to invoke the habeas corpus jurisdiction of the federal courts.

As previously noted, *Eisentrager* arose from petitions for habeas corpus filed by German nationals captured in China at the end of World War II, tried and convicted by a military commission, and detained at Landsberg Prison in Germany. They sought habeas corpus review of the circumstances of their confinement and release from prison. This Court observed,

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an enemy alien who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

339 U.S. at 768. This court squarely declined to create a right of habeas corpus review for "enemy aliens, resident, captured and imprisoned abroad." *Id.* at 777. Instead, it held that the federal courts lacked jurisdiction to consider the enemy aliens' petitions.

Significantly, the *Eisentrager* Court distinguished between resident and nonresident enemy aliens. Resident enemy aliens are subject to arrest, internment, and deportation, with any judicial review limited to the existence of a state of war and the fact of alien status. 339 U.S. at 775 (citing *Ludecke v. Watkins*). A nonresident alien does not have even "this qualified access to our courts, for he neither has comparable claims

upon our institutions nor could his use of them fail to be helpful to the enemy." *Id.* at 776. The nonexistent rights of nonresident enemy aliens could not be squared with their demand for access to the United States courts:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were in any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.

339 U.S. at 777-78. Ultimately, the *Eisentrager* Court held that the challenge to the conditions of confinement was for the political and military authorities, not the courts, to resolve. *Id.* at 789 n.14.

Subsequently, in *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990), this Court held that the Fourth Amendment did not apply to the search and seizure by United States agents of property owned by a nonresident alien and located outside the United States. Citing *Johnson v. Eisentrager,* this Court emphasized the "significant and deleterious consequences" that would accompany any extension of the Fourth Amendment's protections to property owned by foreign nationals located in foreign countries. 494 U.S. at 273. This Court concluded, "For better or worse, ... [i]f there are to be restrictions on searches and seizures which occur [outside our borders] incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *Id.*

The D.C. Circuit correctly applied *Johnson v. Eisentrager* and *Verdugo-Urquidez* in rejecting Petitioners' attempt to invoke the habeas corpus jurisdiction of the federal courts. As the D.C. Circuit said, "We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not." *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C.Cir. 2003). Furthermore, it makes no sense to interfere with military decision-making after having recognized the dangers of doing so. For example, in this case, the *al Odah* Petitioners may wish to confront the Afghan and Pakistani villagers who allegedly sold them out notwithstanding the good they were doing. In addition, they may wish to confront the commanders who participated in the decision to detain them. In the end, no matter what the process is called, it threatens intrusion into military functions.

3. Confinement of the detainees complies with the law of war and is consistent with the national security interests of the United States.

In pertinent part, the 1949 Geneva Convention relative to prisoners of war defines prisoners of war as persons who have fallen into the hands of the enemy and fit within one of the following two categories:

> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to a conflict and operating in or outside their own territory,

> even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.

See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(a)(1)-(2), 6 U.S.T. 3316, 75 U.N.T.S.135. The driving force behind these criteria is the need to distinguish enemy combatants from the civilian population. The armed forces, militia, and volunteer corps referred to in subsection (1) are presumptively distinguishable from civilians, while the militia, volunteer corps, and organized resistance movements in subsection (2) are presumptively not and, as a result, must satisfy the stated criteria to be treated as prisoners of war.

The detainees here do not qualify for treatment as prisoners of war.[7] At the outset, they claim not to be combatants at all. More generally, however, they did not

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[7] Even if they did, custom and practice would allow for their detention until the end of the hostilities. That is what happened with Americans captured by the Germans and Japanese during World War II as well as Germans captured by U.S. Forces, some of whom were confined in Alabama.

meet the criteria of article 4(a)(2). As Secretary of Defense Rumsfeld has explained:

> The determination that Taliban detainees do not qualify as prisoners of war under the convention was because they failed to meet the criteria for POW status.
>
> A central purpose of the Geneva Convention was to protect innocent civilians by distinguishing very clearly between combatants and noncombatants. This is why the convention requires soldiers to wear uniforms that distinguish themselves from the civilian population. The Taliban did not wear distinctive signs, insignia, symbols or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with civilian non-combatants, hiding in mosques and populated areas. They were not organized in military units, as such, with identifiable chains of command; indeed, al Queda forces made up a portion of their forces.

Rumsfeld, U.S. Senators Brief Media at Guantanamo Bay, United States Mission to the European Union, January 27, 2002.[8] Because they do not satisfy the criteria, the detainees are not entitled to be treated as prisoners of war.[9]

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[8] Available at http://www.useu.be/Terrorism/USResponse/Jan2702RumsfeldSenatorsGuantanamo.html.

[9] Petitioners' request for a hearing by an Article 5 tribunal to resolve doubts regarding their status fails because those claims assert rights under a treaty that is not self-executing, and entail the same practical difficulties that a habeas corpus petition does.

In contrast, the soldiers, sailors, airmen, and Marines of the amici States satisfy the criteria. They constitute an organized armed force with a clear chain of command. They wear uniforms, and they carry arms openly. Moreover, they are trained in the law of war, and Judge Advocates accompany units in the field. The Judge Advocates provided legal advice to commanders on a variety of issues, including those relating to the application of the law of war. Reserve and National Guard Judge Advocates have deployed as well. An Assistant United States Attorney from the Middle District of Alabama and an Assistant Attorney General of Alabama, for example, deployed to Kuwait with the 226th Area Support Group as that unit's Judge Advocates. The point here is that American forces, honor the law of war.

In the view of the amici States, compliance with the law of war should be rewarded, and non-compliance should not. Giving Petitioners the benefit of prisoner of war status even when they do not satisfy the definition of a lawful combatant gives them no incentive to satisfy the definition. More to the point, al Qaeda terrorists will find noncompliance with the criteria of Article 4 to be in their interest because it will allow them to move among the civilian populace without detection. Thus disguised, they target not only civilians but also Coalitian Forces, who can readily be identified as such because, among other things, they wear uniforms and carry arms openly in compliance with the Geneva Convention. Al Qaeda's

operatives' willful noncompliance with the laws of war must come with consequences.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Richard F. Allen
Acting Attorney General

Kevin C. Newsom
Solicitor General

John J. Park, Jr.
Assistant Attorney General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7997, 242-7401 *

(39) (40)

Nos. 03-334, 03-343

Supreme Court, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH
PRESIDENT OF THE UNITED STATES, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF LAW PROFESSORS, FORMER LEGAL ADVISERS OF THE DEPARTMENT OF STATE AND AMBASSADORS, RETIRED JUDGE ADVOCATES GENERAL AND RETIRED MILITARY COMMANDERS, AND OTHER INTERNATIONAL LAW SPECIALISTS IN SUPPORT OF RESPONDENTS

DAVID B. RIVKIN, JR.
Counsel of Record
LEE A. CASEY
DARIN R. BARTRAM
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 861-1731

RUTH WEDGWOOD
CHARLES FRIED
MAX KAMPELMAN
Counsel for Amici Curiae

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the statutory writ of habeas corpus extends to foreign enemy combatants captured abroad in the course of United States military operations against al Qaeda and the Taliban, who are interned, at Guantanamo Bay Naval Base and other locations outside the United States, as combatants during the ongoing conflict.

LIST OF *AMICI* AND COUNSEL*

Kenneth Anderson is Professor of Law at the Washington College of Law, American University. He was General Counsel of the Open Society Institute and the Soros Foundations from 1994-1996, and Director of the Arms Project, Human Rights Watch, from 1992-1994.

Carl A. Auerbach is the Distinguished Professor of Law at the University of San Diego School of Law. He taught for more than 30 years at the Universities of Wisconsin and Minnesota. He is a member of the American Law Institute and the American Academy of Arts and Sciences.

Stewart A. Baker is a partner and head of the Technology Department of Steptoe & Johnson in Washington, D.C. He was General Counsel of the National Security Agency from 1992-1994.

Darin R. Bartram is a partner in the law firm of Baker & Hostetler, LLP.

Marshall J. Breger is Professor of Law at the Columbus School of Law, The Catholic University of America. He served as Solicitor, Department of Labor, from 1992-1993. During 1987-1989 he served as alternate delegate of the U.S. to the U.N. Human Rights Commission in Geneva, and from 1986-1990 served on the Secretary of State's Advisory Committee on International Law.

---

* Affiliations of *amici* and their counsel listed for identification purposes only.

LIST OF *AMICI* AND COUNSEL – Continued

Lee A. Casey is a partner in the firm of Baker & Hostetler, LLP, and served in the Office of Legal Counsel in the U.S. Department of Justice.

Robert A. Destro is Professor of Law at the Columbus School of Law, The Catholic University of America and served as Interim Dean from 1999-2001. From 1983 to 1989, he served as a commissioner on the U. S. Commission on Civil Rights.

John C. Eastman is Professor of Law at Chapman University School of Law, specializing in Constitutional Law and Legal History. He is also the Director of the Center for Constitutional Jurisprudence, a public interest law firm affiliated with the Claremont Institute for the Study of Statesmanship and Political Philosophy.

Samuel Estreicher is Charles L. Denison Professor of Law at New York University School of Law. He is co-director of the Institute of Judicial Administration.

General Ron Fogleman, U.S. Air Force, Retired, is the chairman and CEO of an international aviation consulting firm. He is former Chief of Staff of the U.S. Air Force.

Charles Fried is the Beneficial Professor of Law at Harvard Law School. He served as U.S. Solicitor General from 1985-1989, and was an Associate Justice of the Supreme Judicial Court of Massachusetts from 1995-1999.

Robert P. George is McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University. He served on the U.S. Commission on Civil Rights.

LIST OF *AMICI* AND COUNSEL – Continued

Mary Ann Glendon is the Learned Hand Professor of Law at Harvard Law School.

Gidon Gottlieb is the Leo Spitz Professor of International Law and Diplomacy Emeritus at the University of Chicago School of Law, and Distinguished Visiting Fellow, Hoover Institution, Stanford University.

Malvina Halberstam is Professor of Law at the Benjamin N. Cardozo School of Law, Yeshiva University. She has served as Counselor on International Law, U.S. Department of State.

Admiral Bruce Harlow, U.S. Navy, Retired, served for 28 years in the Judge Advocate General Corps. He served as Vice Chairman of the U.S. Delegation to the Third United Nations Conference on the Law of the Sea, and is presently a consultant to the U.S. Air Force on international law, lecturing at the Air Force Special Operations School on the law of war.

General Charles Horner, U.S. Air Force, Retired, is former Commander-in-Chief, North American Aerospace Defense Command, and U.S. Space Command. He also commanded the United States Central Command Air Forces. During Operation Desert Storm and Desert Shield, he commanded all U.S. and allied air assets.

Mark Janis is the William F. Starr Professor of Law at the University of Connecticut, and co-author of a casebook on European Human Rights Law.

Ambassador Max M. Kampelman is Of Counsel at Fried, Frank, Harris, Shriver & Jacobson. He was twice named, by Presidents Carter and Reagan, to serve as

LIST OF *AMICI* AND COUNSEL – Continued

Ambassador and Head of the U.S. Delegation to the Conference on Security and Cooperation in Europe (the Helsinki process). He has chaired the United Nations Association, Georgetown University's Institute for the Study of Diplomacy, Freedom House, and the American Academy of Diplomacy. In 1989, he was awarded the Presidential Citizens Medal by President Reagan. In 1999, he was awarded the Presidential Medal of Freedom by President Clinton.

General John Keane, U.S. Army, Retired, is former Vice Chief of Staff of the Army. He has also commanded the 18th Airborne Corps and the 101st Airborne Division, and served as the Deputy Commander-in-Chief of the U.S. Atlantic Command. He was featured in Tom Clancy's book, *Airborne*, and is the recipient of an honorary Ph.D. in Law from Fordham University.

Michael I. Krauss is Professor of Law at George Mason University School of Law. He served for five years on Quebec's Human Rights Commission.

John O. McGinnis is Professor of Law at Northwestern University School of Law. From 1991 to 2002 he was on the faculty of the Benjamin N. Cardozo School of Law, Yeshiva University. He is a former attorney-adviser and Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, where his work included national security matters.

Geoffrey P. Miller is the William T. and Stuyvesant P. Comfort Professor of Law at New York University School of Law.

LIST OF *AMICI* AND COUNSEL – Continued

Major General Michael J. Nardotti, Jr., U.S. Army, Retired, was the Judge Advocate General of the Army from 1993-1997, the senior military legal advisor to the Army's civilian and military leadership and the officer principally responsible for the administration of military justice and the delivery of comprehensive legal services to the Army world-wide.

Michael F. Noone, Jr. is Professor of Law at the Columbus School of Law, The Catholic University. He served twenty years as a Judge Advocate in the U.S. Air Force.

Philip D. Oliver is Ben J. Altheimer Distinguished Professor of Law at William H. Bowen School of Law, University of Arkansas at Little Rock.

Antonio F. Perez is Professor of Law at the Columbus School of Law, The Catholic University. He served for several years in the Office of the Legal Adviser of the U.S. Department of State.

Stephen B. Presser is the Raoul Berger Professor of Legal History at Northwestern University School of Law.

Michael Ramsey is Professor of Law at the University of San Diego School of Law, where he teaches international law.

David B. Rivkin, Jr., is a partner in the law firm of Baker & Hostetler, LLP, and was Deputy Director, Office of Policy Development, U.S. Department of Justice, and served in the White House Counsel's Office.

Ronald D. Rotunda is the George Mason University Foundation Professor of Law at George Mason University

LIST OF *AMICI* AND COUNSEL – Continued

School of Law. He was formerly Albert E. Jenner Professor of Law at the University of Illinois.

Rear Admiral William L. Schachte, Jr., U.S. Navy, Retired, was Acting Judge Advocate General, the Navy's senior uniformed lawyer. He has served as Director, Navy International Legal Division, and received an LL.M. in International and Comparative Law (with highest honors) from the George Washington University Law School.

Mortimer Sellers is Regents Professor of the University System of Maryland and Director, Center for International and Comparative Law.

Major General Nolan Sklute, U.S. Air Force, Retired, was Judge Advocate General of the Air Force from 1993-1996. As the senior military legal advisor to the Air Force's civilian and military leadership, he was responsible for the administration of military justice throughout the Air Force.

Abraham D. Sofaer is the George P. Shultz Distinguished Scholar and Senior Fellow at the Hoover Institution, Stanford University. He served as Legal Adviser of the U.S. Department of State from 1985-1990.

Richard Steinberg is Professor of Law at the University of California at Los Angeles School of Law. He serves on the editorial board of *International Organization*.

Paul B. Stephan is the Lewis F. Powell, Jr., Professor of Law at the University of Virginia School of Law.

Rear Admiral Everette D. Stumbaugh, U.S. Navy, Retired, was Judge Advocate General of the Navy from

LIST OF *AMICI* AND COUNSEL – Continued

1988-1990. Earlier in his career, he received an LL.M. in Public International Law and Comparative Law (with highest honors) from the George Washington University Law School. He also served as International Law Advisor in the Office of the Chief of Naval Operations, Department of Defense Oceans Policy Coordinator, and Deputy Judge Advocate General of the Navy.

Robert Turner is former Charles H. Stockton Professor of International Law at the U.S. Naval War College, and co-editor of the casebook *National Security Law*.

Ruth Wedgwood is the Edward B. Burling Professor of International Law and Diplomacy, School of Advanced International Studies, Johns Hopkins University. She was formerly Professor of Law at Yale Law School. She has served on the Secretary of State's Advisory Committee on International Law since 1993, and chaired the Council on International Affairs of the Association of the Bar of the City of New York from 1992-1995.

Brigadier General Michael C. Wholley, U.S. Marine Corps, Retired, is the former Staff Judge Advocate to the Commandant of the Marine Corps. He served over thirty years on active duty, including extensive combat duty in Vietnam as an F-4 Phantom pilot, as Staff Judge Advocate to several operational commands, and as Chief Judge of the Navy-Marine Corps Judiciary.

Richard G. Wilkins is Professor of Law at Brigham Young University. He served as assistant to the Solicitor General of the U.S. from 1981-1984.

LIST OF *AMICI* AND COUNSEL – Continued

General Michael J. Williams, U.S. Marine Corps, Retired, was Assistant Commandant of the Marine Corps from 2000-2002. He commanded Marine Air Group 26 during Desert Shield and Desert Storm.

Edwin D. Williamson is a partner at Sullivan & Cromwell, Washington, D.C. He served as Legal Adviser of the U.S. Department of State from 1990-1993.

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is respectfully submitted[1] by law professors, former State Department Legal Advisers and Ambassadors, retired Judge Advocates General and combatant commanders, and other international law specialists. *Amici* believe that the United States Court of Appeals for the District of Columbia Circuit correctly decided that the statutory writ of habeas corpus is not available to foreign enemy combatants captured and held outside of the United States.

Although the immediate question is jurisdictional, it touches upon the law of armed conflict, and its relationship to constitutional, administrative, and public international law. As lawyers, diplomats, and military professionals who have gained expertise in these matters, we are concerned that the choice of the appropriate legal paradigm may profoundly affect America's ability to defeat al Qaeda's terror campaign against the United States.

SUMMARY OF ARGUMENT

Following the September 11 attacks, Congress authorized the President to use military force against al Qaeda and such "nations, organizations, or persons he determines" assisted al Qaeda's acts of war against the United States. In the midst of a continuing conflict, and in an effort to regulate the President's conduct of the war abroad, petitioners ask the Court to invent an unprecedented and unfounded extraterritorial extension of habeas corpus. Their proposed test of "complete jurisdiction and

[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, nor did any party to this action before the Court, or any other person or entity, other than the undersigned *amici*, make a monetary contribution to the preparation or submission of this brief.

control," as the new limit for the writ, could extend to American military installations around the world, occupied territory, and even to combat zones such as Iraq, as well as to other informal and even confidential arrangements between the United States and foreign governments.[2] There would be no apparent limit to this "globalization" of the writ of habeas corpus.

The motive for this proposed legal usurpation is petitioners' assertion that the President's conduct of the war has violated international law, particularly through the capture and wartime internment of enemy combatants at the Guantanamo Bay Naval Station in Cuba. Therefore, the Court's consideration of this case may be assisted by having available the historical and specialized materials that demonstrate the consistency of the President's actions with the principles of international law, including the tradition of the Geneva Conventions.

Claims made that Guantanamo is a "legal black hole" or "rights-free zone" unaccountably ignore the settled rules of the law of armed conflict. That law permits nations to defend their citizens through the use of military force, including the capture and detention of enemy combatants throughout the conflict. Application of these rules does not depend on whether Congress has "declared war" so long as an armed conflict is still in progress. Suggestions that the courts should regulate the capture and detention of foreign combatants abroad would interpose the judiciary in an area the Constitution reserves to the political branches. Neither an activist reading of international law, nor political criticism of the President's wartime strategy, warrants the suggested overthrow of the bright line rule

[2] *Compare Totten v. United States*, 92 U.S. 105, 106-107 (1875) ("public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential" including "all secret employments of the government in time of war").

that limits the statutory remedy of habeas corpus to matters affecting American citizens and matters occurring on American sovereign territory.

ARGUMENT

I. The Law of Armed Conflict Applies to the Conflict Between the United States and Al Qaeda and the Taliban.

The United States has been "at war" at least since September 11, 2001, when agents of the al Qaeda terrorist organization seized four American passenger aircraft, and carried out attacks against the World Trade Center and the Pentagon.[3] Nearly three thousand people were killed; many hundreds more were wounded; the vast majority of the victims were civilians. Al Qaeda reportedly hoped to use the fourth airplane (which crashed in Pennsylvania) to attack the United States Capitol or the White House. The gravity of al Qaeda's attempt to decapitate the American national government in a coordinated set of attacks has led to new post-Cold War consideration of how to preserve the continuity of American democratic government.[4]

Congress responded to these extraordinary acts of war by authorizing the President "to use all necessary and appropriate force against those nations, organizations, or

[3] As the French Ambassador to the United States recently said, his government "immediately viewed [the September 11 attack] as an act of war" and within an hour, "a French resolution was approved by the Security Council branding the act as such and calling for pursuit of the terrorist leaders." Jean-David Levitte, *Setting the Record Straight*, COSMOS CLUB BULLETIN, Feb. 2004, at 15 (reporting the Ambassador's Dec. 1, 2003 discussion at the Cosmos Club).

[4] *See* PRESERVING OUR INSTITUTIONS–THE FIRST REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION (2003), available at <http://www.continuityofgovernment.org/pdfs/FirstReport.pdf>.

persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added). Determining that al Qaeda was responsible for the September 11 attacks, and that the Taliban militia continued to harbor al Qaeda personnel and training camps, the President deployed American military forces to Afghanistan. The legality of the American resort to armed force against al Qaeda and the Taliban was endorsed by the North Atlantic Treaty Organization, the United Nations Security Council (acting under Chapter VII of the U.N. Charter), and the members of the Rio and ANZUS Pacts.[5]

In fact, al Qaeda has targeted American military and diplomatic personnel and American civilians for over a decade. Beginning in 1992, bombing American peacekeepers in Aden, Yemen, al Qaeda rapidly escalated with the 1993 truck-bomb attack on the World Trade Center. This was followed by a 1994 car bomb attack on American soldiers at the Riyadh training center, a 1995 truck bomb attack on the "Khobar Tower" barracks in Saudi Arabia, killing 19 and wounding 372 American soldiers, and the massive 1998 truck bomb attacks on the American Embassies in Kenya and Tanzania, killing 212 and wounding 4500 persons. In January, 2000, al Qaeda attempted (unsuccessfully) to bomb the *U.S.S. The Sullivans*, then

[5] North Atlantic Treaty Organization (NATO), Statement by the North Atlantic Council (Sept. 12, 2001), *reprinted in* 40 I.L.M. 1267 (2001); U.N.S.C. Res. 1368 (Sept. 12, 2001), available at <http://www.un.org/docs/scres/2001/sc2001.htm>; U.N.S.C. Res. 1373 (Sept. 28, 2001), available at <http://www.un.org/docs/scres/2001/sc2001.htm>. The North Atlantic Council invoked Article 5 of the NATO Treaty for the first time in its fifty year history. Similarly, the OAS Foreign Ministers invoked the Inter-American Treaty of Reciprocal Assistance (1947). *See* OAS press release E-194/01, Sept. 21, 2001, available at <http://www.oas.org/OASpage/press2002/en/press2001/sept01/194.htm>.

refueling in Aden harbor, and successfully attacked the *U.S.S. Cole*, nine months later in the same port. Since September 11, 2001, even after the battlefield successes of American and allied troops in Afghanistan, al Qaeda has continued to target America and its allies around the world.[6] The Taliban has continued to fight American forces in southeastern Afghanistan, despite the formation of a new government in Kabul under Hamid Karzai. Osama bin Laden's 1998 "fatwa" declaring war against all Americans, all Jews, all Christians, and all "apostate" Muslims, still remains in effect, and the United States is still battling al Qaeda around the world.

II. The Law of Armed Conflict and Its Scope.

The law of armed conflict is *lex specialis*, a distinctive branch of international law that takes account of the unique problems of warfare.[7] Sometimes called "international humanitarian law," it draws upon the same normative and ethical commitments as human rights law, attempting to spare innocent civilians and to mitigate the hardship of warfare. However, in weighing the balance, it must also take account of the catastrophic effect of enemy attacks upon the safety and the survival of a nation's civilians. It recognizes that, during war, a state must weigh a complex set of interests – including the need to protect its society and population against physical harm and destruction. As a result, the law of armed conflict permits acts that would be forbidden during peacetime, including killing enemy soldiers in combat, capturing and detaining enemy soldiers on the battlefield, and interning

[6] *See, e.g.*, Raymond Bonner, *Threats and Responses: Detainees; Singapore Announces Arrest of 21 Men Linked to Planned Attacks on U.S. Targets*, N.Y. TIMES, Sept. 17, 2002, at A17.

[7] *See Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, at ¶ 25 (1996).

enemy soldiers for the duration of the conflict to prevent their return to the fight.[8]

The law of armed conflict's applicability does not depend on whether "war" has been formally declared. *See Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801); *see also,* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, common art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) ("Convention shall apply to all cases of declared war *or any other armed conflict* which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them") (emphasis added) [hereinafter Geneva III]. Indeed, many countries no longer formally declare war as such, because of the limitations of the United Nations Charter, but a state of war exists whenever a foreign foe has committed an act of war or aggression. In the Vietnam conflict, the 1991 Persian Gulf War, and the 2003 allied intervention against Saddam Hussein in Iraq, Congress did not formally declare war, but authorized the use of force against foreign foes. Congress also authorized the use of force against al Qaeda and the Taliban.

The law of armed conflict's substantive rules depend both on custom and treaty. Customary law develops from the practice of states recognized as legally obligatory. Especially in this area so important to the survival of

[8] The rights and duties of participants in war and armed conflict are governed by the law of armed conflict. But it is pertinent to note that international human rights law also acknowledges that a "public emergency threatening the life of the nation" may warrant adaptation of the law to meet the emergency. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 4, 999 U.N.T.S. 171 (entered into force for the United States, Sept. 8, 1992); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 15, 213 U.N.T.S. 221.

states, customary law crucially depends upon the practice of states. It is not invented by the opinions of individual moralists or law professors.[9]

There is no comprehensive treaty text addressing every wartime issue, and customary law changes in the face of new problems. Multilateral conferences of states crafting treaty texts may unavoidably "fight the last war."[10] The Hague Conventions of 1899 and 1907 foresaw, in the so-called "Martens Clause," that the community of states would not be able to agree on a detailed text to codify a solution to all of the problems of war. (For example, the 1949 Geneva Conventions apply only to conflicts "between two or more of the High Contracting Parties.")[11] Accordingly, the Martens Clause calls upon states to recognize that:

> [u]ntil a more complete code of the laws of war has been issued, . . . in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of

[9] *See United States v. Ramzi Yousef*, 327 F.3d 56, 100-03 (2d Cir. 2003) ("Some contemporary international law scholars assert that they themselves are an authentic source of customary international law, perhaps even more relevant than the practices and acts of States . . . . [This assertion] may not be unique, but it is certainly without merit."). *Accord The Paquete Habana*, 175 U.S. 677, 700 (1900).

[10] Law of war authority Colonel G.I.A.D. Draper noted this problem: "The Geneva Conventions of 1949 are excellent instruments of humanitarian law but they were unfortunately backwards-looking to the experience of World War II." *See* Colonel G.I.A.D. Draper, *The Legal Classification of Belligerent Individuals* (Paper delivered at University of Brussels, 1970), *reprinted in* REFLECTIONS ON LAW AND ARMED CONFLICTS–SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, O.B.E. 196, 199-200 (Michael A. Meyer and Hilaire McCoubrey, eds., 1998).

[11] Geneva III, *supra*, art. 2. Al Qaeda, of course, is not a Geneva party.

> nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

See Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, preamble, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

Of course, the attempt to fit the principles of the Geneva tradition to the raw facts of a terrorist adversary involves human interests on both sides of the equation.[12] The protection of innocent civilians from car bomb attacks is a human rights interest, just as is the protection of combatants caught on the battlefield. Nevertheless, the President has undertaken to treat captured al Qaeda and Taliban detainees humanely and, in accord with the *principles* of Geneva, without conceding that the Geneva Conventions would apply in all their particulars.

III. Al Qaeda and the Taliban are Unlawful and Unprivileged Combatants, and Cannot Claim the Full Privileges of the Geneva Conventions.

As Commander-in-Chief, President Bush has determined that the al Qaeda and Taliban fighters detained at

[12] The Inter-American Court of Human Rights embraced this point in the *Velasquez-Rodriguez Case (Honduras)*, Inter-Am. Ct. H.R. (ser. C, no. 4) (1988), ¶ 172, *reprinted in* 9 HUM. RTS. L.J. 212 (1988), and in 28 I.L.M. 291 (1989). When the Honduran government disclaimed responsibility by arguing that it was not itself running the death squads, the Inter-American Court replied that each government has an affirmative duty to protect the human rights of its citizens, in particular, to guard against the arbitrary deprivation of life by private groups. So, too, the United States government has an affirmative duty, under the laws of war and the principles of human rights, to effectively protect innocent civilians from the private violence of al Qaeda.

Guantanamo Bay are "unprivileged" or "unlawful" combatants. Because of this determination, the detainees are not entitled to the full rights and privileges of prisoners-of-war ("POWs") under the Geneva Conventions. The President properly based this conclusion on the traditional prerequisites of lawful belligerency, as recognized by the Geneva Conventions. Al Qaeda is "an international terrorist group and cannot be considered a state party to the Geneva Convention," and both al Qaeda and the Taliban have failed to satisfy the traditional four-part test of having a responsible commander, wearing a uniform or distinctive insignia, carrying arms openly, and conducting military operations "in accordance with the laws and customs of war." *See* Ari Fleischer, White House Spokesman, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002), at LEXIS, Legis Library, Fednew File.

Nonetheless, the President has undertaken to treat all internees humanely. *See* Office of the White House Press Secretary, Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> ("The United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate, and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949.").

It must be emphasized that President Bush did not invent the classification of unprivileged or unlawful combatant for the war against al Qaeda and the Taliban. The first modern effort to codify the law of armed conflict, Union Army General Order No. 100, gave prime attention to "unlawful" and "unprivileged" belligerency. General Order No. 100 was drafted by Columbia University law professor Francis Lieber, and promulgated by President Lincoln in 1863. It includes four different categories of unlawful combatants: "armed prowlers," "spies," "highway

robbers or pirates," and "war-rebels."[13] In the Lieber Code, unlawful belligerency meant, at a minimum, that the fighter was "not entitled to the privileges of prisoners of war."[14]

The status of unlawful belligerent or combatant was recognized throughout the nineteenth and twentieth centuries, in the Brussels Declaration of 1874, and again in the Hague Rules of Land Warfare of 1907, and its key distinctions have been preserved in the modern Geneva tradition. *See* Geneva III, *supra*, art. 4. As noted in the official Geneva commentary of the International Committee of the Red Cross, the very definition of "armed forces" depends upon these "material characteristics" and "attributes": "they wear uniform[s], they have an organized hierarchy and they know and respect the laws and customs of war."[15]

The President's conclusion that the members of al Qaeda, and the Taliban, are unlawful combatants is clearly correct. Neither group satisfied the four critical criteria. Indeed, al Qaeda is nothing but a private organization. The law of armed conflict does not authorize

[13] *See* Lieber Code, Instructions for the Government of the Armies of the United States in the Field, arts. 82-85 (Apr. 24, 1863), available at <http://www.au.af.mil/au/awc/awcgate/law/liebercode.htm>.

[14] *Id.*

[15] INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949–COMMENTARY, GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 62-63 (Jean S. Pictet & Jean de Preux eds., 1969). *See also Mohamed Ali and Another v. Public Prosecutor*, 3 All E.R. 488 (P.C. 1968), *reprinted in* HOWARD LEVIE, ED., DOCUMENTS ON PRISONERS OF WAR 757, 763 (U.S. Naval War College 1979) ("It would be anomalous if the requirements for recognition of a belligerent with its accompanying right to treatment as a prisoner of war, only existed in relations to members of [militias or volunteer corps] and there was no such requirement in relation to members of the armed forces.").

violence by private individuals, and private groups are not entitled to the privileges of belligerency – regardless of whether the motivation is ideological, religious, or political. *See* 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 254 (H. Lauterpacht ed., 7th ed. 1952) ("Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces . . . "); CORNELIUS VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR 127 (Peter DuPonceau, trans. & ed.) (Philadelphia 1810) ("We call pirates and plunderers (praedones) those, who, without authorization of any sovereign, commit depredations by sea or land."); DIETER FLECK (ED.), THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (commentary on Joint Services Regulation 15/2 of the German Bundeswehr), § 304, 71-72 (1995) ("Only states or other parties which are recognized as subjects of international law can be parties to an international armed conflict . . . . combatants are privileged solely by that entitlement . . . ").[16]

The Taliban's status also presents anomalous facts. Although Afghanistan is a party to the 1949 Geneva Conventions, the Taliban was not its legal government or "armed forces." Indeed, the Taliban militia "never claimed to be the Afghanistan government or armed forces" and "exercised none of the usual activities of a government, other than the negative one of closing down all schools."[17]

[16] *See also* HENRY W. HALLECK, INTERNATIONAL LAW; OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 348 (1861) ("individual is liable to punishment" for "any act [otherwise] within the rules of war, not authorised or assumed by his government, as the act of the state"); EMMERICH DE VATTEL, THE LAW OF NATIONS 591, bk. 3, ch. 15 (Dublin, Luke White ed. 1792) (1758) ("The right of making war . . . belongs alone to the sovereign power, which not only decides whether it be proper to undertake the war, and declare it, but likewise directs all the operations . . . . Therefore subjects cannot act herein of themselves, and without the sovereign's order they are not to commit any hostility.").

[17] W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT. L. 493, 506 n.21 (2003). Colonel Parks, of the U.S. Marine

(Continued on following page)

Neither the United States, the United Nations, the League of Islamic Nations, nor Switzerland (as the treaty depository for the Geneva Conventions) ever recognized the Taliban as Afghanistan's government. The Taliban did not claim Afghanistan's seat in the U.N. General Assembly, and the Security Council openly debated whether a binding Council resolution could be issued against a "non-state entity" such as the Taliban. *See, e.g.*, U.N.S.C. Res. 1333 (Dec. 19, 2000), available at <http://www.un.org/docs/scres/2000/sc2000.htm> (condemning "continuing use of areas of Afghanistan under the control of *the Afghan faction known as Taliban*") (emphasis added). As one widely-respected military law expert has noted, the Taliban was at most "a faction engaged in a civil war in a failed state."[18]

Moreover, even if the Taliban had been a legitimate government, it did not prosecute war in a legitimate way. Taliban combatants targeted civilians, killed journalists, and used civilians and mosques as shields. They acted with perfidy by pretending to surrender – for example, in the Taliban/al Qaeda rebellion at the Mazar-i-Sherif fortress.

The anomalous nature of the parties in the conflict in Afghanistan has important consequences for the application of the Geneva Conventions, and the legal status of the al Qaeda and Taliban members captured by the United States. Unlawful combatants are certainly not entitled to be set at liberty while a war is ongoing, for even lawful combatants may be captured and held for the duration of the armed conflict – including follow-on operations against hold-outs. Unlawful combatants retain protections under

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Corps Reserve (Retired), formerly served as the Special Assistant for Law of War Matters to the Judge Advocate General of the Army.

[18] *Id.* Prior to September 11, 2001, only three governments – Saudi Arabia, Pakistan, and the United Arab Emirates – recognized the Taliban, and each withdrew its recognition following September 11.

the basic norms of customary international law, the Martens Clause, and norms comparable to those in common Article 3 of the Geneva Conventions (applicable to insurgents in civil wars).[19] However, as unlawful combatants, they do not enjoy the full rights and privileges of Geneva POWs.[20] Unlawful combatants are denied the full

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[19] Without dispute, all detainees are entitled to humane treatment. Under the rules of Geneva III, however, lawful combatants would enjoy a number of privileges – such as the right to military pay, the right to have free run of the detention camp and the right to gather *en masse* – that are clearly inappropriate or dangerous in the case of al Qaeda and the Taliban. In addition, under Geneva, lawful combatants may not gain any advantage because they are cooperating. This could pose an obstacle to effective collection of intelligence essential in thwarting future attacks by al Qaeda. Also, classification as a lawful combatant could potentially immunize a non-state-actor from criminal liability for terrorist attacks against American military installations and personnel.

[20] Some writers have suggested that, to assure a "seamless" treaty regime, any unlawful combatant who falls outside the full statutory privileges of Geneva III should automatically gain the privileges and protections of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. *See* Knut Dormann, *The Legal Situation of Unlawful/Unprivileged Combatants*, 85 INT'L REV. RED CROSS 45 (Mar. 2003). But this was not the view of many States Parties. *See, e.g.*, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, at p. 621 (remarks of U.K. delegate: "The whole conception of the Civilians Convention was the protection of civilian victims of war and not the protection of illegitimate bearers of arms, who could not expect full protection under the laws of war to which they did not conform.") *See also* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 189 (1998) ("Not all those falling into the hands of a belligerent become prisoners of war or are entitled to prisoner of war status. Enemy civilians, for example, when taken into custody or interned do not fall into this category, and if captured are entitled to treatment in accordance with Geneva Convention IV, 1949, *unless they have taken part in hostile activities when they may be regarded as unlawful combatants and treated accordingly.*") (Emphasis added).

Nonetheless, it is worth recalling that even the Fourth Geneva Convention reflects the exigencies of war. Under Article 5 of that Convention, civilians of the opposing power who are "in occupied

(Continued on following page)

rights of lawful belligerents so as to create an incentive system for appropriate behavior in wartime. Unlawful combatants cannot exploit legal asymmetry, demanding the privileges that they fail to accord to their adversary. The matter was put plainly by Professor Richard Baxter of Harvard: "International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents." *See* Major R.A. Baxter, *So-called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs*, BRITISH YEARBOOK OF INTERNATIONAL LAW 1951, at 343. " 'Unlawful belligerency,' " noted Baxter, "is actually 'unprivileged belligerency.' "[21]

IV. United States Policy Is Consistent With the Laws and Customs of War.

Although the Guantanamo detainees are not entitled to the full privileges of Geneva POWs, there are several other practical and legal questions related to their treatment and, with respect to each of these, we believe that American policy is consistent with international law and ethics.

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territory" or "in the territory of an adversary" are subject to internment by decision of the detaining power where they are "definitely suspected of or engaged in activities hostile to the security of the State." Thus, an enemy civilian who is suspected of plotting violence, even if he is not technically a "combatant," could be interned for the duration of the conflict. *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 78, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[21] *Accord* JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 549 (1954) (the distinction between "privileged"/"protected"/"lawful" belligerents or combatants, and "unprivileged"/"unprotected"/"unlawful" belligerents or combatants, "draws the line between those personnel who, on capture, are entitled under international law to certain minimal treatment as prisoners of war, and those not entitled to such protection").

A. The Right To Intern Captured Combatants, and Permissible Locations

All captured combatants (lawful and unlawful) are legally subject to detention or internment throughout the duration of an armed conflict. *See Ex Parte Quirin*, 317 U.S. 1, 31 (1942); *see also*, Geneva III, *supra*, art. 21 ("The Detaining Power may subject prisoners of war to internment."); Hague Regulations, *supra*, arts. 4-5 ("Prisoners of war are in the power of the hostile Government .... Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits .... "). This internment is not punishment, but a prophylactic measure, the primary purpose of which is to keep a prisoner from returning to the fight. Allowing internment, in fact, strengthens the "life-or-death" battlefield guarantee – that combatants should be permitted to surrender, and that their opponents *must* accept the surrender and "give quarter." In real world settings, many armies would not take prisoners if they knew that the captured enemy would immediately be released, frustrating efforts to defeat the opposing force.

Further, alien enemy combatants have not been entitled to challenge their detention in court.[22] During World War Two, some 400,000 German and Italian prisoners of war were captured and transported to the continental United States for internment, and were repatriated only at the end of the war. Initially, their internment was "indefinite," since neither they nor their captors knew when the war would end. Nevertheless, so far as the case

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[22] Here, citizenship makes a difference of quality and kind. Americans who have fought for a foreign enemy may seek review of any capture and detention by habeas corpus. *See* Remarks by Alberto R. Gonzales, Counsel to the President, before the American Bar Association Standing Committee on Law and National Security, Washington, D.C., Feb. 24, 2004, available at <http://www.abanet.org/natsecurity/judge_gonzales.pdf>.

reports reveal, the federal courts did not entertain any habeas petitions challenging this civil internment, which is simply a normal prerogative of war. The only reported exception is *In re Territo,* 156 F.2d 142 (9th Cir. 1946), which concerned an Italian-American enemy combatant who unsuccessfully asserted that his citizenship should prevent his detention. This dearth of litigation is consistent with the history of the common law. In English common law, alien enemy combatants and alien prisoners of war were plainly excluded from access to the writ of habeas corpus, no matter where they were detained. *See, e.g.*, 9 HALSBURY'S LAWS OF ENGLAND pp. 710-11, ¶ 1212 (2d Ed. 1931-1942) (the writ "will not be granted . . . to an alien enemy who is a prisoner of war").[23]

Although many enemy combatants were transferred to the United States during World War Two, this is not required. Under customary law, and the 1949 Geneva Conventions, the capturing power is merely required to hold detainees at a safe distance from the fighting, lest they "be exposed to the fire of the combat zone." *See* Geneva III, *supra*, art. 23. Captives cannot be held in penitentiaries or detained on naval vessels (to avoid the infamous practice of "prison hulks"). They should be interned in a favorable climate. *Id.* But the detaining power is permitted to choose a place where available security arrangements will discourage any escape or rescue attempts.[24]

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[23] Accord *Rex v. Knockaloe Camp Commandant*, 87 L.J.K.B. 43, 46 (1917) (Avery, J.) ("There is clear authority that a person who is an alien enemy prisoner of war is not entitled to apply to the Court for a writ of habeas corpus."); *Furly v. Newnham*, 2 Doug. K.B. 419 (1780) ("The Court will not grant a habeas corpus ad testificandum to bring up a prisoner of war.").

[24] These constraints may help to explain the choice of Guantanamo as a locale.

B. Screening Combatants: The Safeguards Against Mistakes

No one wishes to have non-combatants, of any nationality, subject to mistaken detention as a combatant. A battlefield can be confusing, and the United States obtained custody of some detained combatants from the Afghan Northern Alliance and other allied groups. To safeguard against mistakes, there has been a careful ongoing process of interviews, screening, and review by American military and intelligence teams, to assure that each person was in fact a combatant. According to the Department of State's Legal Adviser, more than 10,000 detainees were screened in Afghanistan. The "vast majority" were released. *See* William Taft, *Guantanamo Detention is Legal and Essential*, FINANCIAL TIMES, Jan. 12, 2004, at 19. Only a small number were transferred to Guantanamo. As Mr. Taft noted, American policy "was, and is, that only enemy combatants who pose special security, intelligence or law enforcement concerns are transferred to Guantanamo." *Id.*

Screening teams and review panels are the traditional method used to categorize combatants (widely used, for example, in Vietnam and the Gulf War, *see, e.g.*, United States Military Assistance Command Vietnam, Directive No. 381-46, Military Intelligence: Combined Screening of Detainees (Dec. 27, 1967)). The screening and review process for combatants captured in the ongoing conflict in Afghanistan has involved four layers of assessment and review *before* a person may be transferred to Guantanamo. There is an assessment in the field, then another by a military screening team at a central holding area, then a third review by a general officer designated by the combatant commander of Central Command, and then a fourth review by an internal Department of Defense

review panel, including legal advisors and members of the Joint Staff.[25]

Every internee transferred to Guantanamo is again formally reassessed upon arrival, with another review by the Southern Command and then by a panel of experts from the Pentagon, including officials from the General Counsel's office and the Joint Staff. A recommendation is made "whether the detainee should be released, transferred to the custody of a foreign government or continue to be detained."[26] The recommendation is next sent out to an interagency experts group, including officials of the Department of Justice, and then is sent up to the Secretary of Defense or his designee for review.[27] Foreign governments may also be asked for further information concerning their citizens who were captured in the fighting. Even after the completion of this administrative review, it remains a prime objective throughout interviews conducted for military intelligence purposes to revisit the identity of the person, any aliases he may have used (one internee had 13 aliases), and the nature of his martial conduct in Afghanistan and elsewhere. The government has also stated that it will revisit and re-determine status whenever any doubt may newly arise in individual cases.[28]

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[25] *See* Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce, Feb. 13, 2004, transcript available at <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html>, and Briefing by Paul Butler, Principal Deputy Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, and Army Major General Geoffrey D. Miller, Commander, Joint Task Force Guantanamo, February 13, 2004, transcript available at <http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html>.

[26] Butler Briefing, *supra*.

[27] *Id.*

[28] *See* Statement by State Department Spokesman Richard Boucher, U.S. Department of State Press Briefing (Feb. 8, 2002), available at <http://www.state.gov/r/pa/prs/dpb/2002/7918.htm>.

Of course, the screening process is more complicated than in other wars. Al Qaeda and the Taliban do not issue identity cards or dog tags, or assign military ranks. There are no official rosters of membership, or records of their deployments. Confirming the captive's status may require his interrogation (permissible under Geneva III), scrutiny of intelligence sources (such as statements of other battlefield detainees, captured documents, or records taken from al Qaeda safe houses and training camps), and even more sensitive sources such as the statements of senior al Qaeda who have begun to cooperate with the United States and its allies. As Secretary of Defense Rumsfeld recently noted, "it takes time to check stories, to resolve inconsistencies, or in some cases even to get the detainee to provide any useful information to help resolve the circumstance."[29]

To supplement the investigative processes and screening, the Secretary of Defense recently announced that he will institute an additional set of safeguard procedures, through administrative review panels.[30] These panels will provide an independent review of each detainee at least annually, to see whether he can appropriately be transferred or released. The inquiry will determine whether the detainee "continues to pose a threat to the United States," but of course, any new information concerning his identity or pre-capture conduct would be pertinent to that determination. The detainee will have the opportunity to appear in person. His foreign government can submit information pertinent to the review, including information on his behalf. Some form of ombudsman, perhaps a lawyer, will be made available "to help the detainee understand what the process and procedures are." The structure of the independent panel, additional review of the panel's

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[29] *See* Rumsfeld Remarks, *supra*.

[30] *Id.*

determination, and methods of assuring that any leads provided by the detainee are appropriately followed-up, are issues presently under consideration.[31] It will be guided by the commitment that the "United States has no desire to hold enemy combatants any longer than is absolutely necessary."[32]

This is a rigorous process, with administrative checks and balances far exceeding the single military field-screening used in many prior conflicts. *Compare* CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW, 1981-1988, at 3455 (Marian Nash Leich, ed. 1995) ("Determination of precise status is accomplished through screening by the capturing or detaining unit commander; in this case, the U.S. Army ground force commander."). This careful and continuous process provides the substantive scrutiny contemplated by the Geneva III treaty. Although the screening has not been called an "Article 5" proceeding, in the language of Geneva III, it provides a searching factual inquiry to protect any person who might have been swept up in a conflict, while protecting the

[31] One or more *amici* have recommended to the Department of Defense that the administrative review boards should be implemented in a way that permits a hearing, once intelligence collection and investigation is complete, at intervals that may be shorter than a year – upon the request of a detainee and the proffer of any new and relevant information. In addition, these *amici* have recommended that the detainee should be given the assistance of a military lawyer or other counselor where necessary to organize or present any information on his behalf. It is a practical challenge to structure a review process, because some information pertinent to a detainee's alleged membership in al Qaeda or the Taliban may derive from highly sensitive sources and methods. The virtue of using a military review board is that it provides the greatest chance of a workable accommodation between the competing claims of the detainee to careful fact-checking, and the public to the protection of intelligence sources needed to thwart future attacks.

[32] Rumsfeld Remarks, *supra*.

public against the careless release of dangerous combatants who will kill more innocent civilians.[33]

There are several misconceptions about the nature and role of so-called Article 5 determinations under Geneva III applicable to conventional wars and lawful belligerency. First, there is no requirement that every combatant detainee should have an Article 5 determination. Rather, in accordance with the treaty's language, Article 5 determinations are used only where, after screening, the detaining power has a remaining "doubt" about a person's legal status. As British law of war authority Colonel G.I.A.D. Draper has noted, "the Detaining Power seems to be the sole arbiter, in good faith, of whether a doubt occurs as to the status of the individual concerned." *See* G.I.A.D. Draper, *supra*, at 220-21 n.23. The same conclusion is reached by Dr. Ameur Zemmali, a Francophone scholar of Islamic law and modern humanitarian law who currently serves as a legal advisor to the International Committee of the Red Cross. Dr. Zemmali has noted, "[t]he doubt envisaged by [Article 5] is an element of which appreciation, subjective by nature, is

[33] Casual release of an al Qaeda combatant may be far more dangerous than the release of a foot soldier in a traditional war, since al Qaeda combatants have been schooled in methods of killing scores of civilians, and have been taught that this is lawful conduct under the fatwas of bin Laden. Deputy Assistant Secretary of Defense Paul Butler, who was formerly an Assistant United States Attorney in the Southern District of New York and a prosecutor in the 1998 Embassy Bombings trial, has noted that "[e]nemy combatants at Guantanamo include not only rank-and-file jihadists who took up arms against the United States, but also senior al Qaeda operatives and leaders, and Taliban leaders." Butler Briefing, *supra*. One example, Mr. Butler has noted, is an "al Qaeda member who was plotting to attack oil tankers in the Persian Gulf using explosive-laden fishing boats." *Id.*

left implicitly at least, to the detaining power. The point of view of the adverse Party is not considered."[34]

Second, Article 5 determinations are focused on legal status, rather than a reconstruction of battlefield conduct. Article 5 speaks of "any doubt . . . as to whether persons, *having committed a belligerent act* and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [of Geneva III]." A typical question concerning legal status would be a deserter from a military unit. In contrast, in the case of the war in Afghanistan, the disqualification from lawful belligerency turns upon the *overall* characteristics of the Taliban and al Qaeda, not individual conduct. Such an overall determination is properly made by the Commander-in-Chief, not by the varying opinions of field grade officers. The President, as Commander-in-Chief, has found, *inter alia*, that al Qaeda and Taliban fighters systematically failed to follow the laws of war, and hence did not qualify for lawful combatancy.

Third, Article 5 determinations are *not* assigned to civilian courts or international tribunals, but rather are made by the military. "No representative of the Protecting Powers appears to have the right to be present," notes Colonel Draper, and there is "no definition of a 'competent tribunal.'" *See* G.I.A.D. Draper, *supra*, at 220-21 n.23. A "properly constituted tribunal" under Article 5 "need not . . . be a court," agrees Canadian authority L.C. Green, who was a British war crimes prosecutor in World War

[34] *See* AMEUR ZEMMALI, COMBATTANTS ET PRISONNIERS DE GUERRE EN DROIT ISLAMIQUE ET EN DROIT HUMANITAIRE (Editions Pedone, Paris 1996) (Ph.D. thesis, Faculty of Law, University of Geneva) ("Le 'doute' envisagé par [Article 5] est un élément dont l'appréciation, subjective par nature, est laissée implicitement au moins, a la Puissance détentrice. Le point de vue de la Partie adverse n'est pas considéré."). The translation in the text above is rendered by counsel to *amici*.

Two.[35] Article 5 panels in U.S. practice typically consist of three military officers. The proceedings are administrative in nature, not civil or criminal, and, under established U.S. practice, the combatant has no right to counsel.

Petitioners Al Odah, *et al.*, offer the remarkable suggestion that the Administrative Procedure Act forbids the President from deciding how to implement the law of war in light of the nature of the conflict, and in particular suggest that it is "arbitrary and capricious" to supplement the Department of Defense joint service rules used for Article 5 determinations in a conventional war,[36] with procedures better suited to an unconventional war.[37]

But this Court's precedents make clear that the President is not considered an "agency" regulated by the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *Dalton v. Specter*, 511 U.S. 462, 470-74 (1994).[38]

[35] L.C. Green, *supra*, at 190. *See also* Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, at p. 563: "In the opinion of certain Delegations only a regular Court should be authorized to take a decision in such cases. The majority of the Committee, in spite of its sympathy with this point of view, was unable however to accept it." *Cf.* MARCO SASSOLI AND ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS, AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 783-84 (International Committee of the Red Cross 1999) (asking students to consider whether a screening center, such as the Combined Tactical Screening Centers in Vietnam, would as such "satisfy Art. 5(2) of Convention III").

[36] *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, OPNAVINST 3461.6, AFJI 31-304, and MCO 3461.1, at 1-6.

[37] *See Fawzi Khalid Abdullah Fahad Al Odah, et al. v. United States*, Nos. 03-334, 03-343 (Brief on the Merits) at pp. 5, 22 (Jan. 14, 2004).

[38] Petitioners "do not identify which 'agency' of the United States they have in mind." *Al Odah v. United States*, 321 F.3d 1134, 1149 (D.C. Cir. 2003) (Randolph, J., concurring).

The capture and internment of enemy prisoners is also the archetype of "military authority exercised in the field in time of war," and thus is expressly excluded by the APA from judicial review. *See* 5 U.S.C. § 701(b)(1)(G); *see also* 5 U.S.C. § 551(1)(G). The rulemaking requirements of the APA – which petitioners apparently would like to apply to the implementation of the Geneva Convention and international customary law – expressly do not apply to "military or foreign affairs function[s]." *See* 5 U.S.C. § 553(a)(1).[39]

Petitioners equally ignore this Court's settled conclusion in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that the Geneva Conventions are *not* subject to direct enforcement in the federal courts. As the Court noted, "[t]he obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14.

C. How Long Can Unlawful Combatants Be Interned?

The Court's intervention is also sought because some detainees were captured more than two years ago. But active hostilities still continue in Afghanistan, with Taliban infiltration in the southeast, and al Qaeda continues to target Americans and U.S. allies around the world. The difficulty in stating when this war will end, of course, is exacerbated because the principal adversary is a non-state-entity. There is no government that can enter into a peace agreement or order its soldiers to demobilize. Indeed, Osama bin Laden has taught al Qaeda recruits that continuing to wage a violent jihad against Americans, Christians, Jews, and "apostate" Muslims is a religious duty.

[39] There is a parallel exemption for the decisions of "military commissions." *See* 5 U.S.C. § 701(b)(1)(F) and (G).

Nonetheless, the law of armed conflict permits captured al Qaeda and Taliban members to be held until the close of active hostilities, *compare* Geneva III, *supra*, art. 118, and it would make little sense to require the release of combatants who openly boast that they will continue to attack Americans whenever the opportunity arises. As State Department Legal Adviser William Howard Taft IV has noted, "All wars last too long. Releasing captured combatants to return to the fight would make them last longer."[40]

Moreover, the periodic administrative reviews of status, instituted by the United States, will permit the identification of individuals who are less likely to continue the fight if released, and as the backbone of the al Qaeda organization is broken, many more al Qaeda and Taliban recruits may be willing to rethink their positions.

D. Trial of Unlawful Combatants in Military Commissions

Claims that the Guantanamo detainees have been consigned to a legal "black hole" are further undercut by the President's order of November 13, 2001, and the implementing rules of March 2002, providing for the trial of certain members of al Qaeda in military commissions. These criminal prosecutions are distinct from the civil internment of a combatant until the end of a conflict. The President has a duty, as a commander, to enforce the law of war, and it is a long-standing practice to try war crimes in a military commission. This was the venue used for criminal trial of enemy combatants in World War Two. The Nuremberg Trials took place in a military tribunal, and Geneva III Article 84 actually *requires* that the trials of

[40] Taft, *supra*.

traditional prisoners of war must take place in military tribunals, rather than civilian courts.

Congress has recognized and acknowledged the President's power to convene military commissions, in the course of its revision of the code of military courts-martial in 1920 (then called the "Articles of War"), in the passage of the Uniform Code of Military Justice in 1950, and in the passage of the 1996 War Crimes Act.[41] Article 15 of the 1920 Articles of War stated that "[t]he provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute *or by the law of war* may be triable by such commissions." Articles of War, art. 15, in Pub. L. No. 242, ch. 227, 41 Stat. 787, 790 (1920) (emphasis added). The military commissions of World War Two were conducted without any further specific legislative authority from the Congress, though some observers have been misled on this point by the use of the phrase "Articles of War" for the general revision of the military criminal code in 1920.[42] The language of Article 15 was carried forward into 10 U.S.C. § 821, as part of the 1950 Uniform Code of Military Justice, and provides equally strong authority for the commissions established by President Bush.

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[41] *See generally*, Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT. L. 328 (2003).

[42] *See Shafiq Rasul et al., v. Bush, et al.*, No. 03-334 (Brief on the Merits), at 30-31 (Jan. 14, 2004); Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFFAIRS 7 (Jan.-Feb. 2004) ("[T]he government in *Quirin* was operating under a specific grant of authority from Congress . . . . "); Harold Koh, *The Case Against Military Commissions*, 96 AM. J. INT. L. 337, 340 & n.20 (2002) ("In *Quirin*, Congress . . . had specifically authorized the use of military commissions in its Articles of War.").

The Secretary of Defense has published detailed rules for the conduct of such trials, with careful procedural protections, including proof beyond a reasonable doubt, presumption of innocence, the defendant's right to cross-examine witnesses, the right to call defense witnesses, the right to production of exculpatory evidence, the right to choice of military defense counsel, the right to retain civilian counsel, and the right of appeal to an independent appellate panel.[43] The trials will be open, except on occasions when classified evidence must be presented, and military defense counsel will be present whenever any evidence is considered. The appellate panel has independent authority to reverse and remand a conviction for serious errors of law in the conduct of the trial.[44] Current appellate panel appointments include a former U.S. Attorney General, a former Cabinet officer, a state chief justice, and a former state attorney general.

To be sure, the military tribunals' rules permit the consideration of a broader range of evidence than is permitted in federal jury trials (namely, any evidence that has "probative value to a reasonable person"), but that is also the standard for admissibility used by European courts and the United Nations war crimes tribunals. The

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[43] The procedural rules for commission trials are published on the Internet. *See* Department of Defense Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism*, Mar. 21, 2002, available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

[44] In announcing the appellate rules, a senior defense department official reaffirmed that, "[t]he opinions of the review panel, when the review panel sends a case back down for further proceedings or for dismissal of charges, those are binding." *See* Department of Defense Briefing, Dec. 30, 2003, available at <http://www.defenselink.mil/transcripts/2003/tr20031230-1081.html>. *See also* Department of Defense Military Commission Instruction No. 9, *Review of Military Commission Proceedings*, Dec. 26, 2003, available at <http://www.defenselink.mil/news/Jan2004/d20040108milcominstno9.pdf>.

weight of the evidence must still satisfy the demanding standard of proof beyond a reasonable doubt. With the publication of carefully-drawn "Elements of Crimes,"[45] and the designation of a widely-respected Army Major-General (Retired) as Appointing Authority, preparations for the beginning of a trial process are complete. The time taken in framing fair procedural rules will serve well,[46] and several battlefield detainees have been referred for possible prosecution, with the appointment of defense counsel. Two prosecutions have now begun.[47] The vigor of the defense that can be expected from military defense counsel before the military commissions is shown by the *amicus* brief filed by several of those defense counsel in the instant case before this Court.

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[45] *See* Department of Defense Military Commission Instruction No. 2, *Crimes and Elements for Trials by Military Commission*, Apr. 30, 2003, available at <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf>.

[46] *See* Ruth Wedgwood, *Al Qaeda and American Self-Defense*, (Appendix) in SEPTEMBER 11, TERRORIST ATTACKS, AND U.S. FOREIGN POLICY 176-78 (Demetrios James Caraley, ed., The Academy of Political Science, 2002) (reprinting Joint Statement of Individual High-Level Advisors to the Secretary of Defense).

The procedural rules are consistent with the standards for fair trial set out in Geneva Convention IV, *supra*, arts. 72-75, and with Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, art. 75 (albeit the United States is not a party to Protocol I). It should be noted that military commissions are, in principle, a venue in which any member of the armed forces can be tried for war crimes, although the prevailing practice is to use courts-martials. *Cf.* Geneva III, *supra*, art. 102.

[47] On February 24, 2004, Guantanamo detainees Ali Hamza Ahmed Sulayman al Bahlul of Yemen and Ibrahim Ahmed Mahmoud al Qosi of Sudan were charged with conspiracy to commit war crimes. *See* Two Guantanamo Detainees Charged, United States Department of Defense News Release No. 122-04, Feb. 24, 2004, available at <http://www.defenselink.mil/releases/2004/nr20040224-0363.html>.

V. Conclusion

The political branches inevitably play a central role in shaping the content of international law – both in framing the state practice that aids the evolution of customary international law, and in the application of treaties in a world where foreign adversaries may not respect the same norms. The power of the Presidency to make battlefield decisions is essential in protecting the United States against an adaptable foe that has recruited and trained young men to conduct a violent jihad against innocent civilians. This power of the Commander-in-Chief includes the traditional prerogative of restraining captured enemy forces who would otherwise return to the fight.

As this Court recognized in *Eisentrager*, the Geneva Conventions are *not* subject to direct enforcement in the federal courts. "[T]he obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities." 339 U.S. at 789 n.14. This sound judgment recognizes that the primary engine of enforcement must remain the reciprocal interest shared by all states in the humane conduct of war. After careful consideration, the President concluded that al Qaeda and the Taliban were unlawful combatants in their fight to maintain control of Afghanistan, and this was a reasonable judgment.

The American commitment to the decent treatment of all persons in its custody remains a centerpiece of our foreign policy, including in the war against terrorism. The struggle against terrorism will be won in large part by our devotion to the ideals of this country's founding. But we must also win on the battlefield. Even lawful foreign enemy combatants are not entitled to use the courts of their adversary in order to fight the war. It would be an extraordinary extension of the judicial role for the courts to create a roving supervisory jurisdiction over the conduct

of American foreign policy and military operations around the globe. The President's determination to abide by the principles of Geneva gives no occasion for this Court to revolutionize the reach of statutory habeas corpus.

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

DAVID B. RIVKIN, JR.
Counsel of Record
LEE A. CASEY
DARIN R. BARTRAM
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1731

RUTH WEDGWOOD
CHARLES FRIED
MAX KAMPELMAN
Counsel for Amici Curiae